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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 29

CARL A. HANSBERRY, NANNIE L. HANSBERRY, ET AL., PETITIONERS,

vs.

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED MARCH 11, 1940.

CERTIORARI GRANTED APRIL 22, 1940.

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[fol. 1] [Caption omitted]

[fol. 1½] [File endorsement omitted]

[fol. 2] **IN SUPREME COURT OF ILLINOIS**

APRIL TERM, A. D. 1939

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, LOUISE G. ANDERSON, Lyman M. Anderson and Kathryn Luttrell, Plaintiffs-Appellees,

vs.

CARL A. HANSBERRY, NANNIE L. HANSBERRY, JAMES JOSEPH BURKE, Harry H. Pace, Supreme Liberty Life Insurance Company, a Corporation, Israel Katz, Defendants-Appellants

Appeal from Circuit Court, Cook County

Honorable George W. Bristow, Judge Presiding

Abstract of Record—Filed March 15, 1939

Placita

COMPLAINT OF ANNA M. LEE ET AL.—Filed June 7, 1937

Alleges that Anna M. Lee, a widow, Edward L. Govanus, Esther Govanus, his wife, Louise G. Anderson, a widow, Lyman H. Anderson, her son, Kathryn Luttrell, plaintiffs, on behalf of themselves and on behalf of other plaintiffs similarly situated, complain of Paul A. Hansberry, Nannie L. Hansberry, his wife, Jay B. Crook, Hallie C. Crook, his wife, James Joseph Burke, Harry H. Pace, Supreme Lib-
[fol. 2½] erty Life Insurance Company, a corporation, Isreal Katz, W. T. Mooney, and Elizabeth Cotsones, defendants; that on the 30th day of September, A. D. 1927, more than five hundred white persons, owners of real estate on one or other side of Champlain, St. Lawrence, Rhodes, Eberhart, Vernon and South Park Avenue, between 60th Street on the north and the first public alley north of 63rd Street on the south (except those parts of Champlain and Langley Avenues and 60th Street owned by the Board of Education of the City of Chicago, occupied by the Austin O.

Sexton Public School) and on 60th, 61st and 62nd Streets, between South Park Avenue and the alleys immediately west of Cottage Grove Avenue, and on both sides of Langley Avenue between 61st Street and the first public alley north of 63rd Street, in the City of Chicago, entered into a written agreement with each other that until January 1st, 1948, their respective real estate in said area should be subject to certain restrictions and provisions against use, occupation or ownership of said real estate in said area by Negroes, and against the sale, conveyance or leasing of any part of said premises to any Negro; said agreement is in words and figures as follows, to-wit:

This Agreement entered into the 30th day of September, 1927, by and between the undersigned owners of land on the one or the other side of Evans, Langley, Champlain, St. Lawrence, Rhodes, Eberhart, Vernon and South Park Avenues, between 60th and 63rd Streets and on 60th, 61st and 62nd Streets between South Park Avenue and Cottage Grove Avenue, in the City of Chicago, Witnesseth, that

Whereas, the following named persons own the respec- [fol. 3] tive parcels of land in said area set immediately under their names, having the frontage hereinafter set forth:

And Whereas, the parties hereto feel that the restrictions and covenants hereinafter imposed and created are for the best interests of all the parties hereto and of the property hereinafter described.

In Consideration of the premises and of the mutual covenants hereinafter made, and of the sum of Five Dollars ($5.00) in hand paid to each of the parties hereto by each of the other parties hereto, the receipt of which is hereby acknowledged, each party as owner of the parcel of land above described immediately under his name, does hereby covenant and agree with each and every other of the parties hereto that his said parcel of land is now and until January 1, 1948, and thereafter until this agreement shall be abrogated as hereinafter provided, shall be subject to the restrictions and provisions hereinafter set forth, and that he will make no sale, contract of sale, conveyance, lease or agreement, and give no license or permission in violation of such restriction or provisions, which are as follows:

1. The restriction that no part of said premises shall in any manner be used or occupied directly or indirectly by

any negro or negroes, provided that this restriction shall not prevent the occupation during the period of their employment, of janitors or chauffeurs' quarters in the basement or in a barn or garage in the rear, or of servants' quarters by negro janitors, chauffeurs or house servants [fol. 4] respectively, actually employed as such for service in and about the premises by the rightful owner or occupant of said premises.

2. The restriction that no part of said premises shall be sold, given, conveyed or leased to any negro or negroes, and no permission or license to use or occupy any part thereof shall be given to any negro except house servants or janitors or chauffeurs employed thereon as aforesaid.

The covenants, restrictions and agreements herein contained shall be considered as appurtenant to and running with the land, and shall be binding upon and for the benefit of each party hereto and may be enforced by any of the parties hereto by any permissible legal or equitable proceedings, including proceedings to enjoin violation and for specific performance; provided, however, that in any action brought to set aside any deed made in violation of any of the provisions of this agreement, it shall be a good defense thereto that prior to the institution of such suit, the title to the premises then in question had become vested in, and was then owned by a corporation or a white person or persons, for value; and provided further that the lien of no mortgage or trust deed in the nature of a mortgage shall be impaired or invalidated by reason of the breach of any of the provisions of this agreement, whether any such breach shall have occurred prior to or subsequent to the recording of any such mortgage or trust deed; and provided further, that nothing contained in the foregoing provisos shall in any manner impair the right of any person or persons interested to enforce at all times and against all persons the restrictions in this agreement contained prohibit- [fol. 5] ing the use or occupation of all or any part of said premises by a negro or negroes.

This agreement and the restrictions herein contained shall be of no force or effect unless this agreement or a substantially similar agreement, shall be signed by the owners above enumerated of ninety-five per centum of the frontage above described, or their heirs or assigns, and

recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31st, 1928. Provided, however, that if the owner of any of said parcels or any part thereof shall be under disability, as, for example, when the title is held, without such power, by the testamentary trustees or any other fiduciaries, the frontage so owned shall be treated as though the owners thereof had power to sign, and had signed this agreement, for the purpose of determining whether this agreement becomes effective or not under the provisions of this paragraph.

It is understood that for convenience, a number of counterpart or concurrent instruments have been prepared, of even date herewith, the text of each of which is substantially the same as that of this instrument, and that the execution of any one of such instruments shall have the same effect as the execution of this instrument by the same person would have, and it is understood that parties to this agreement shall include not only those persons who shall sign this instrument, but also all persons who shall sign any of said counterpart or concurrent instruments, and that this instrument and all of said counterpart or concurrent instruments shall constitute one agreement. It being contemplated that changes in ownership may occur between the date which this instrument bears and the date when it [fol. 6] shall become effective, or that there may possibly be some mis-recital of ownership herein contained, it is further understood that the execution hereof by the person who shall be the owner of any of said parcels of land at the time of such execution shall have the same effect as though such person had been the owner thereof on the date hereon and was so described herein, whether the recital of ownership herein contained be made to conform to the facts at the time of execution or not. And if, in order to conform to the facts as to ownership at the time of execution, the recital of ownership in any of said instruments shall be made different from that contained in the others, that difference shall not prevent all of such instruments from being construed to be substantially similar to each other.

No restriction imposed hereby shall be abrogated or waived by any failure to enforce the provisions hereof, no matter how many violations or breaches may occur.

This agreement and the restrictions herein expressed may be abrogated at any time on or after January 1, 1948,

by the written agreement of the owners of seventy-five per centum of the frontage owned by the parties who shall sign this agreement, as herein set forth, such abrogation to be effective from and after the date of delivery and recording of such written agreement. Provided, however, that if the owner of any of said parcels or any part thereof shall be under disability, as for example, that of minority, or for any other reason shall not have the power to execute such abrogation agreement, as for example, when the title is held without such power, by testamentary trustee or other fiduciaries, the frontage so owned shall [fol. 7] be treated as though the owners thereof had power to sign, and had signed, such abrogation agreement, for the purpose of determining whether such abrogation agreement becomes effective or not under the provisions of this paragraph.

The invalidity of any restriction hereby imposed, or of any provision hereof, or of any part of any such restriction or provision, shall not impair or affect in any manner the validity, enforceability, or effect of the rest of this agreement.

Pronouns herein employed in the masculine gender shall be construed to include the feminine and neuter genders, and the word "party" to include natural and artificial parties or persons.

The term "negro," as used herein, shall include every person having one-eighth part or more of negro blood, or having any appreciable admixture of negro blood, and every person who is what is commonly known as a colored person.

In any case where there is a recorded lease of any parcel of the property described herein for a term ending more than five years after any given date the owner of the reversion and the owner of the leasehold estate, together shall be deemed to be the owners of such parcel on such given date within the meaning of this contract, and whenever the signature of the owner of such parcel shall be required on such given date under the provisions hereof, the signature of both shall be required, provided that whatever interest any signer of this instrument owns in any of the said property shall be bound by the provisions hereof. Leases under unrecorded leases on any given date and under leases for terms ending less than five years after

[fol. 8] such given date shall not be regarded as owners within the meaning of this contract.

The undersigned spouses of owners of land herein described join herein for the purpose of signifying their assent hereto and of subjecting their rights of dower, if any, to the restrictions and provisions imposed hereby.

Time is of the essence of this contract and all the terms, conditions and provisions hereof.

The covenants, restrictions and agreements herein contained shall be binding on, and for the benefit of, and may be enforced by and against each party hereto, his successors and assigns, and the heirs, executors, administrators and successors of them respectively.

In witness whereof, the parties hereto have hereunto set their hands and seals the year and day first aforesaid.

It is further alleged in said complaint that it is provided in said Restrictive Agreement that said Agreement should be in full force and effect when the said Agreement or a substantially similar agreement should be signed by the owners of ninety-five per centum of the frontage above described, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31st, 1928; that ninety-five per centum of the owners of the frontage above described, signed, sealed and acknowledged said Restrictive Agreement, and thereafter the same was duly filed for record in the Recorder's Office of said County on February 1, A. D. 1928, and recorded in Book 25525, of Records at pages 5 to 31 inclusive as Document 9914711, and on pages 32 to 52 inclusive as Document [fol. 9] 9914712, and on pages 53 to 115 as Document 9914713, and on pages 117 to 187 inclusive as Document 9914714; "thereby complying in all respects with the conditions in said agreement contained with respect to the execution and recordation thereof."

Said complaint further alleges that on, to-wit: the date of the execution of said restrictive agreement, and on the date of the recording thereof, and up to and including the 30th day of March, A. D. 1933, Eva Somerman was the owner of record of the following described real estate, to-wit:

Lot Twenty-seven (27) in Block Two (2) in Resubdivision of Blocks Eleven (11) and Twelve (12) in Resubdivision of the Washington Park Club Addition to Chicago in the South half (S½) of the South East Quarter (SE¼) of

Section Fifteen (15), Township Thirty-eight (38) North, Range Fourteen (14), East of the Third (3rd) Principal Meridian, commonly known as 6140 Rhodes Avenue, Chicago, Illinois;

that said real estate was then and is now improved with a three story and basement apartment residence; that said real estate is situated within the area covered by said restrictive agreement; (and) that said Eva Somerman executed and acknowledged said agreement before the recordation thereof; that up to, to-wit: the 26th day of May, 1937, the said premises were owned and occupied by white persons exclusively; that said Eva Somerman and her husband conveyed said premises to one Joseph G. Stoltz by quit-claim deed dated March 30, 1933, recorded March 31, 1933; that said Joseph G. Stoltz by quit-claim deed dated March 31st, 1933, recorded April 27, 1933, conveyed said premises to the First National Bank of Englewood, a corporation.

[fol. 10] It is further alleged in said complaint that the defendant James Joseph Burke, acting on behalf of the defendants Paul A. Hansberry, a Negro and Harry H. Pace, a Negro attorney and Secretary of the Supreme Liberty Life Insurance Company, a corporation, fraudulently and knowingly and deceitfully represented to said First National Bank of Englewood, or its officers, that said premises would not be sold to a Negro or Negroes, and by such fraud, deceit and misrepresentations induced the officers of said First National Bank of Englewood, a corporation, to execute a conveyance of said premises to the defendant Jay B. Crook, a white person; which conveyance was made by quit-claim deed from the said First National Bank of Englewood under the belief and with the distinct understanding that said sale was not to be to a Negro; that said Jay B. Crook well knew when he accepted the deed from said National Bank of Englewood, that said premises were actually being purchased for and on behalf of the defendant Paul A. Hansberry; that in fact the said Jay B. Crook was then in unlawful conspiracy and combination to violate said restrictive agreement with the defendant Harry H. Pace, a Negro, the secretary of the defendant Supreme Liberty Life Insurance Company, and to procure a loan on said premises from said Supreme Liberty Life Insurance Company; that the deed from said

Bank to said Crook, escrowed with the Chicago Title & Trust Company of Chicago, and was not delivered to said Jay B. Crook until May 26, 1937, but that on May 19, 1937, Jay B. Crook with his wife Hallie C. Crook, executed and delivered a Trust Deed to the Chicago Title & Trust [fol. 11] Company as Trustee on said premises to secure their note for Four Thousand Four Hundred Dollars ($4,400.00) payable to the defendant Supreme Liberty Life Insurance Company; of which said Harry H. Pace, a Negro is the Secretary, payable in monthly installments; that said Trust Deed and said quit-claim deed from said Bank to said Crook were recorded simultaneously; said quit-claim deed as Doc. No. 12003437 and said Trust Deed as Doc. No. 12003438; that in furtherance of said conspiracy and combination, defendant, Paul A. Hansberry, a Negro, with his Negro family and a number of other Negroes with his family, moved into and took possession of the first apartment and basement of said 6140 Rhodes Avenue, on May 26, 1937: (and) that by quit-claim deed dated May 27, 1937, said Jay B. Crook, and his wife, conveyed said premises to said defendants Paul A. Hansberry and Nannie L. Hansberry, his wife, which deed was recorded the same date, May 27, 1937, in the Recorder's Office of said county as Doc. No. 12003884; and that said defendant Paul A. Hansberry, a Negro, and other Negroes are now in possession and occupying the first apartment and basement of said premises.

That said defendant Jay B. Crook was not a bona-fide purchaser of said premises, but obtained title to said premises by fraud, and by an unlawful conspiracy and combination with the defendants James Joseph Burke, Paul A. Hansberry and Harry H. Pace, for the sole purpose of violating the provisions and covenants for said restrictive agreement.

Said complaint further represents that said defendants, Paul A. Hansberry, Harry H. Pace, James Joseph Burke [fol. 12] and Jay B. Crook, had actual knowledge of the existence and validity of said restrictive agreement; that the defendant, Paul A. Hansberry, by fraud and misrepresentation perpetrated on a Receiver of this court on or about October 1, 1936, moved into and occupied the first floor of building No. 540 E. 60th Street, Chicago, within said restricted area; which is known in said restrictive agreement as parcel No. 468; that by a decree of this court in

the case of Plath v. DeLaunty, et al., entered on the 10th day of November A. D. 1936, said Paul A. Hansberry was directed and ordered to vacate said premises, that said decree was appealed to the Appellate Court of Illinois, First District, which court affirmed said decree of this court; that on said 26th day of May, 1937, said defendant Paul A. Hansberry, moved from said building No. 549 E. 60th Street and immediately moved into said premises at 6140 Rhodes Avenue, Chicago, which he is now occupying; that defendant Harry H. Pace, is unlawfully occupying the premises known as No. 413 E. 60th Street, Chicago, Illinois, known as parcel No. 472 of said restrictive agreement; that on the 12th day of May, 1937, a complaint to enforce said restrictive agreement as to said 413 E. 60th Street, Chicago, was filed in the Superior Court on May 12, 1937, in the case of Cook, et al. v. Lutz, et al., Gen. No. 37 S 6290, in which said Harry H. Pace is a defendant, and in which case said Harry H. Pace, as secretary of the defendant Supreme Liberty Life Insurance Company, also induced the said Insurance Company to make a loan on said 413 E. 60th Street, of Thirty-five Hundred Dollars ($3500.00); and within said restricted area; that the defendant James Joseph Burke [fol. 13] until March 1, 1937, was the President and Executive Secretary of the Woodlawn Property Owners' Association, a corporation, the object of which association was the enforcement of said restrictive agreement; that said restrictive agreement was decreed by the Superior Court of said County in the case of Olive Ida Burke v. Isaac Kleiman, Gen. No. 567887, to be in full force and effect, which decree was affirmed by the Appellate Court of Illinois, District, on November 27, 1934; also in the case of Penoyer v. Cohn in the Superior Court of said County, Gen. No. 34 S. 16816; that the defendant James Joseph Burke is the husband of said Olive Ida Burke, who was the complainant in the above case of Burke v. Kleiman, affirmed in the Appellate Court as aforesaid; that said James Joseph Burke resigned as executive Secretary of said Woodlawn Property Owners' Association on March 1, 1937, and since that date, wilfully, maliciously has been conspiring with the defendants, Paul A. Hansberry, Harry H. Pace and other Negroes to place Negroes either as tenants or owners into possession of real estate in said restricted area; that on various occasions within the past five or six weeks the said defendant James Joseph Burke has stated as follows: "I am going to put

niggers into twenty or thirty buildings in the Washington Park Subdivision," also on a recent occasion said Burke stated: "I will get even with the Woodlawn Property Owners' Association by putting niggers in every block. You property owners in the subdivision (meaning the Washington Park Subdivision) will soon have headaches." Also, "I will get even with the Association and with certain [fol. 14] directors of said Association (whom he names) if that is the last thing I do."

Said complaint further alleges that said James Joseph Burke was instrumental in the sale of both said 413 E. 60th Street and 6140 Rhodes Avenue properties; that the plaintiffs fear and verily believe that defendant James Joseph Burke will carry his threats as herein set forth into execution unless restrained from doing so by the Injunction of this court.

Said complaint further states that the plaintiffs, Anna M. Lee, Edward L. Govanus, Esther Govanus, and Louise G. Anderson, were parties to and signers of said Restrictive Agreement before and at the time of the recording thereof; that plaintiff Kathryn Luttrell derived title to the premises at 6138 Rhodes Avenue, by means of conveyances from Patrick T. Burke, one of the signers of said agreement; that said plaintiff Anna M. Lee is a widow, and owner of a building at 6148 Rhodes Avenue, situated about one hundred feet south of said building now owned and occupied by said defendants Paul A. Hansberry and Nannie L. Hansberry; that plaintiffs, Edward L. Govanus and Esther Govanus are the owners of a building at 6142 Rhodes Avenue; that plaintiffs Louise G. Anderson and Lyman H. Anderson, are the owners of a building at 6117 and 6110 Eberhart Avenue; that the plaintiff, Kathryn Luttrell is the owner of a building at 6138 Rhodes Avenue; that all of the plaintiffs and buildings are within said restricted area, and had a total value of upwards of One Hundred Thousand Dollars; that plaintiffs have ever since said Restrictive Agreement went into effect, observed the covenants and restrictions therein [fol. 15] contained with respect to ownership, use or occupancy.

Said complaint further alleges that by reason of the violation of said restrictive agreement by said defendant Hansberry, the plaintiffs' real estate has been irreparably damaged in value, (and) said plaintiffs' tenants, all of whom are white persons, are threatening to break their leases.

It is further alleged that plaintiff, Kathryn Luttrell, had, just before said Hansberry took possession of his building, leased one of her three apartments to a responsible white tenant at Fifty-five dollars ($55.00) per month; that since Hansberry occupied 6140 Rhodes Avenue, said tenant had refused to move into said plaintiff Luttrell's apartment building; (and) that plaintiffs will suffer other irreparable injury to their property and property rights unless said defe dants, Paul A. Hansberry and Nannie L. Hansberry, are compelled by the decree of this court to vacate said premises.

The complaint further states that said Restrictive Agreement has been in full force and effect ever since the same was executed and recorded; that all the owners and occupants of the properties within said restricted area, except on South Park Avenue between 60th and 61st Street, and three apartment buildings on 60th Street between South Park Avenue and Vernon Avenue, are white persons; that said owners are desirous that said Restrictive Agreement remain in full force and effect, and plaintiffs bring this action on their own behalf and on behalf of and as representatives of other owners of premises in said restricted area similarly situated, who are more than five hundred in number and too numerous to be individually made parties and described by name.

[fol. 16] That said occupancy of the premises at 6140 Rhodes Avenue is a violation of said Restrictive Agreement; that said restricted area is a compact, closely built-up and extremely valuable section of the City of Chicago, improved with valuable residences, apartment buildings, hotels and business property of the value of many millions of dollars; all of which will be greatly depreciated in value if said Negro defendants are permitted to own or occupy said premises within said restricted area; that the total number of parcels of real estate covered by said Restrictive Agreement is over 550; that proceedings are pending against the Negro occupants of buildings on South Park Avenue between 60th and 61st Streets.

That the parties executing said agreement and concurrent and counterpart agreements in said Washington Park Subdivision, did so for the purpose of establishing a uniform restriction to safeguard the interests and values of said properties subject thereto; that said covenants should run with the land, and bind their respective heirs and assigns

until January 1, 1948, and thereafter until said agreement should be abrogated as therein provided by written agreement of seventy-five per centum of the frontage; and that it was further provided in said agreement that no restrictions imposed thereby should be abrogated or waived by any failure to enforce the provisions thereof, no matter how many violations or breaches might occur.

That it is further provided in said agreement that the covenants, restrictions and agreement therein contained should be considered as appurtenances to and running with [fol. 17] the land, and shall be binding upon and for the benefit of each party thereto, and might be enforced by any of the parties thereto by any permissible legal or equitable proceedings, including proceedings to enjoin violation and for specific performance.

It is further alleged that proceedings are pending against the Negro occupants of buildings on South Park Avenue between 60th and 61st Streets; that the defendants, W. T. Mooney and Elizabeth Cotzones, are white tenants in the building at 6140 Rhodes Avenue, and refuse to pay rent to said Paul A. Hansberry and Nannie L. Hansberry and refuse to attorn to said Paul A. Hansberry and Nannie L. Hansberry, as landlords and owners, (who) threaten to dispossess said W. T. Mooney and Elizabeth Cotsones from said building in order to move other Negroes into said building; that said Paul A. Hansberry and Nannie L. Hansberry by reason of said Restrictive Agreement are unlawfully in possession of said building and are not entitled to collect rents from said defendant W. T. Mooney and Elizabeth Cotsones, but threaten to do so and on refusal to pay rent will attempt to dispossess said W. T. Mooney and Elizabeth Cotsones from said Building in order to move other Negroes into said building, and plaintiffs verily believe and fear that the defendants Paul A. and Nannie L. Hansberry will do so unless restrained from collecting rents from said W. T. Mooney and Elizabeth Cotsones and restrained from dispossessing said W. T. Mooney and Elizabeth Cotsones from said premises and restrained from renting, leasing to or installing other Negroes in the second and third apartments of 6140 Rhodes Avenue, Chicago.

The complaint further alleges that the defendant, Israel [fol. 18] Katz, is the owner of the building commonly known as 6018 Vernon Avenue; that said Israel Katz was the record owner of said premises when said Restrictive Agree-

ment went into effect on February 1, 1928, and executed the said restrictive agreement, and has up to this date observed the restrictions and covenants of said agreement; that said Israel Katz on, to-wit, the 27th day of May, 1937, threatened to sell said building and premises to Negroes and has placed the sale of said premises with said defendant James Joseph Burke, and plaintiffs verily believe that said Israel Katz will carry his threats into execution unless restrained from doing so by the Injunction of this Court.

It is further alleged in said complaint that the defendant, Harry H. Pace, is Secretary of the defendant, Supreme Liberty Life Insurance Company, and in conspiracy and combination with other defendants, is encouraging the violation of said restrictive agreement by making loans to Negroes for the purpose of acquiring real estate within said restricted area; that said Pace is the active executive of said Supreme Liberty Life Insurance Company, a corporation, (and) as such executive has caused said Insurance Company to make an excessive loan on the premises now occupied by said Pace at 413 East 60th Street and on premises now owned by said Hansberry at 6140 Rhodes Avenue, Chicago, that said loans by reason of said restrictive agreement are unlawful, but the plaintiffs fear that said Harry H. Pace and said Supreme Liberty Life Insurance Company, a corporation, will continue to make loans on real estate in said Washington Park Subdivision to Negroes or [fol. 19] to white persons for the purpose of Negro occupancy, unless restrained from doing so by the Injunction of this Court.

Plaintiffs pray:

That said defendants be required to make full and direct answer to this Complaint, but not under oath, their respective oaths being hereby waived; that a temporary injunction issue against said defendant, James Joseph Burke, restraining him from loaning to, bargaining with, selling or attempting to lease, bargain or sell any real estate within said Washington Park Subdivision to Negroes or to white persons for the purpose of leasing or selling such real estate to Negroes or placing Negroes in such properties.

That a temporary injunction issue against the defendant Israel Katz, his agents or solicitors, restraining him from selling or leasing the building known as 6018 Vernon Ave-

nue, to Negroes, or to any white person for resale or leasing to or occupancy by Negroes.

That the defendants Harry H. Pace, and Supreme Liberty Life Insurance Company, be restrained from making any further loans on real estate in said Washington Park Subdivision to Negroes or to white persons for Negro occupancy;

That the Restrictive Agreement be declared in full force and effect and binding upon the said defendants and each of them, their heirs, executors, administrators or assigns.

That the conveyance of premises at 6140 Rhodes Avenue, to defendants, Paul A. Hansberry and Nannie L. Hansberry his wife, be declared void and of no effect and that said Paul A. Hansberry and Nannie L. Hansberry, his wife, be [fol. 20] compelled by the mandatory decree of this court to forthwith remove from said premises and be permanently enjoined from occupying said premises or renting or leasing same to other Negroes; or permitting the same to be occupied by a Negro or Negroes while said restrictive agreement is in full force and effect, except such persons as are allowed by the terms of said restrictive agreement to be therein as house-servants, or janitors or chauffeurs actually employed as such for service in and about said premises by the rightful white owner or occupant of said premises.

That the defendants, Paul A. Hansberry and Nannie L. Hansberry, his wife, be restrained from collecting or attempting to collect rent from the second and third apartment of said building commonly known as 6140 Rhodes Avenue, Chicago, Illinois, or from dispossessing, by legal proceedings or any other means, the defendants W. T. Mooney and Elizabeth Cotzones as tenants from the second and third apartments of said building, and, in case of their voluntary removal, from placing any Negro or Negroes in possession by lease or verbal agreement of the second or third floors of said building, and that a Receiver be appointed by this court to collect the rents of the second and third floors of said building, until the further order of this court.

[fol. 21] *Duly sworn to by Charles A. Churan, jurat omitted in printing.*

[fol. 22] MOTION OF DEFENDANTS CARL A. HANSBERRY (ERRONEOUSLY DESCRIBED IN COMPLAINT AS PAUL A. HANSBERRY) AND NANNIE L. HANSBERRY, HIS WIFE, TO STRIKE THE COMPLAINT, SETS FORTH THE FOLLOWING GROUNDS:

This court should not entertain jurisdiction of the issues involved herein because a prior action is pending between substantially the same parties involving the same issues in the Superior Court of Cook County, case #37 S 7357; under the alleged restrictive agreement it is provided plaintiffs may file any legal or equitable proceedings. Having elected to proceed at law by filing case #37 S 7357, (plaintiffs) should not be permitted to seek equitable relief in the Circuit Court; all proper relief may be had in the original suit filed in the Superior Court of Cook County.

That the complaint is defective in that it does not set up sufficient allegations of fact as distinguished from conclusions, to warrant the granting of any relief; the property alleged to be affected by the alleged restrictive agreement is not legally and accurately described; that names of those who are supposed to have signed the said alleged restrictive agreement do not appear; nor does it appear what specific property was owned by the alleged signatories of said agreement; the complaint alleges that the said restrictive agreement was to be of no force and effect unless signed by the owners of 95% of the frontage in the area sought to be restricted, noting certain exceptions, and yet said complaint does not allege that the owners of 95% of the said frontage, excluding the exceptions, signed the purported agreement; it does not comply with Section 36 of the Civil Practice Act in that relevant parts of the written instrument sued upon, [fol. 23] such as the names of the signers of the alleged restrictive agreement and the legal description of the property owned by them and sought to be covered by agreement, are neither attached thereto nor recited therein; it contains scandalous and impertinent matter; it does not join proper parties plaintiff. The complaint alleges that fraud and deceit were practiced by certain defendants upon the First National Bank of Englewood, a corporation, but does not make the First National Bank of Englewood a party thereto, there is an improper joinder of parties defendant. The defendants, W. T. Mooney and Elizabeth Cotzones are not in privity with the plaintiffs or with any persons interested in the enforcement of the alleged restrictive agreement, nor

are they charged with violating or attempting to violate said alleged agreement; the charges of fraud and misrepresentation against the defendants are largely conclusions rather than allegations of fact; it purports to be a representative suit but does not show the proper authority to file such a proceeding.

Said motion further asserts that the complaint is based upon an alleged restrictive agreement which is illegal and void because it is against the public policy of the State of Illinois; an unreasonable restraint upon alienation; in violation of Section 2, Act 2, Constitution of Illinois, and the 5th Amendment of the United States Constitution, as it would deprive the defendants, Carl A. Hansberry and Nannie L. Hansberry, of their property without due process of law.

Signature of Attorney for defendants, Carl and Nannie L. Hansberry.

Affidavit dated July 1, 1937.

[fol. 24] MOTION TO STRIKE

Motion of defendant, Harry H. Pace, to strike the complaint sets forth, in addition to the grounds in the foregoing motions to strike of Hansberry and Burke, that said Complaint fails to allege facts constituting fraud, or conspiracy, or both, on the part of this defendant, acting individually or with others, against the plaintiffs, and each of them; that the Complaint fails to show a privity of parties in said restrictive Agreement between this defendant and the plaintiffs and each of them; that said Complaint shows that this defendant is not sued in his individual capacity but as an officer of the defendant, Supreme Liberty Life Insurance Company. Therefore, the allegations in said Complaint as to his occupancy of certain premises described in the restrictive agreement, are irrelevant and immaterial and should be stricken as surplusage; that said Complaint fails to show that plaintiffs will suffer irreparable damage if this defendant is not enjoined as prayed therein; that the enforcement of said agreement by this court would constitute a violation of the Fifth and Fourteenth Amendments to the United States Constitution in that such enforcement would deprive this defendant of liberty and property

without due process and would also deny to this defendant equal protection of the laws; that said agreement is not ancillary to the main purpose of a valid contract and is, therefore, an unlawful restraint of trade; that the enforcement of said restrictive Agreement, to which this defendant is an utter stranger, in a Court of Equity, would be oppressive, unreasonable, and contrary to equitable principles.

Signature of Attorney for Harry H. Pace.

[fol. 25] Affidavit dated June 14, 1937.

MOTION TO STRIKE

Motion of defendant, Israel Katz, to strike complaints set forth, in addition to grounds in the foregoing motions to strike of defendants, Hansberry, Burke, and Pace, that plaintiffs refer to large parcels of real estate aggregating, allegedly, 19 contiguous and adjacent city blocks and 6 contiguous and adjacent city half blocks in the city of Chicago, and fail to describe legally and accurately the aforesaid real estate and give the names of the respective owners of the same; that it does not appear from the face of the complaint that there is any privity whatsoever between the plaintiffs or any or either of them in respect to the alleged subject matter of the complaint; that plaintiffs in their complaint do not show what the alleged restrictive agreement is or who are the parties thereto, if any; because it does not appear from the plaintiffs' complaint whether there is one alleged restrictive agreement or whether there are two, three, four, five, or a dozen or more alleged restrictive agreements; that plantiffs in paragraph 2 of the complaint state that the alleged restrictive "agreement should be in full force and effect when the said agreement or a substantially similar agreement should be signed by the owners of 95 per centum of the frontage above described," but do not set forth what the substantially similar agreement is; because the complaint shows on its face that there are more than five hundred necessary parties who have not been joined as parties plaintiff or parties defendant; the said complaint showing that there are 550 or more parcels of said real estate and the respective owners thereof should have been made parties to the said suit and

[fol. 26] cause; because it does not appear from the said complaint that the said alleged restrictive agreement is a covenant running with the land but rather is a mere personal covenant between the alleged persons signing same, if in fact any said alleged covenant was signed; because the plaintiffs have not attached any of the alleged concurrent and counterpart agreements mentioned in paragraph 12 as required by the Civil Practice Act and the rules of this court; because the relief prayed for in paragraph 15 of the complaint cannot be lawfully and equitably based upon the allegations and things contained in paragraphs 1 to 14, both inclusive, of the said complaint; because the alleged restrictive agreement is unconstitutional and void because it unreasonably interferes with freedom of contract of white persons, as well as colored persons, who did not sign or execute the alleged restrictive agreement in respect to the sale and use of their property, thereby depriving said persons and citizens of their property and property rights without due process of law in violation of Section 2 of Article 2 of the Constitution of the State of Illinois and likewise in violation of the 14th Amendment to the Constitution of the United States of America; because the said alleged restrictive agreement is unconstitutional and void for the reason that it expressly contemplates and provides for state action and the use of the State's agencies, its courts and public officers and offices in the enforcement of the said alleged restrictive agreement thereby depriving the defendant and other citizens of Illinois and the United States of America of their rights and property without due process of law in violation of Section 2 of Article 2 of the Constitution of the [fol. 27] State of Illinois and in further violation of the 14th Amendment to the Constitution of the United States of America; the said alleged restrictive agreement is against the public policy of the State of Illinois because it destroys the marketability of land, interferes with the free sale and use thereof, prevents improvements to land and property, encourages waste and disuse of property, discourages the payment of taxes to the State and its various instrumentalities, unsettles the land titles of community and state and impedes the development of communities and tends to promote and perpetuate "slums" or so-called "blighted areas"; said alleged restrictive agreement is unreasonable, illegal, and void because it unreasonably purports to

restrict the use to which the defendant puts his own property, and thereby destroys his liberty, his freedom of contract, in violation of the Constitutions of the State of Illinois and of the United States of America; the said alleged restrictive covenant is unreasonable, unlawful, and void because it purports to include as assenting signatories persons who did not sign the alleged restrictive agreement, and persons who were incapable legally of giving assent thereto; because the said alleged restrictive agreement violates the rule against perpetuities.

Signature of Attorney for Israel Katz.
Affidavit June 14, 1937.

MOTION TO STRIKE

Motion of defendant, Supreme Liberty Life Insurance Company, a corporation, to strike complaint set forth, in addition to the grounds in the foregoing motions to strike of defendants Hansberry, Burke, Pace and Katz, that Complaint fails to show that the restrictive agreement which is the basis of the relief sought by plaintiffs has been [fol. 28] broken or violated by this defendant; the Complaint shows on its face that plaintiffs seek to enjoin this defendant from making mortgage loans, although the restrictive Agreement, which is the foundation of their prayer for injunction, specifically provides that the lien of no mortgage or trust deed in the nature of a mortgage shall be impaired or invalidated by reason of a breach of any of the provisions of said agreement; the granting of the injunction prayed for against this defendant would result in undue hardship and oppression to this defendant and would strip this defendant of the right to conduct its business of making mortgage loans on the same basis of fair and equal competition with similar businesses. The Complaint is therefore fatally defective in that it seeks to aid in creating a monopoly and thus to violate the laws of this State; said Complaint sets forth and intermingles several causes of action and in that respect and in others, violates the provisions of the Civil Practice Act.

Signature of Attorney for Supreme Liberty Life Insurance Company.
Affidavit June 14, 1937.

INTERLOCUTORY ORDER ENTERED JULY 8, 1937, BY JUDGE MICHAEL F. FEINBERG, PROVIDES:

Now comes the Complainants by Charles A. Churan and Schuyler and Hennessy, their attorneys, and the Defendants, Carl A. Hansberry and Nannie L. Hansberry, by C. Francis Stradford, their attorney, the Defendants, Jay B. Crook and Hallie C. Creek, his wife, by Arthur A. Basse, their attorney, Defendant, James Joseph Burke, by Loring B. Moore, his attorney; the Defendants Harry H. Pace [fol. 29], and Supreme Liberty Life Insurance Company, a corporation, by Earl B. Dickerson and Truman K. Gibson, Jr., their attorneys, and the Defendant, Israel Katz, by Irvin C. Mollison, his attorney.

And this cause coming on now to be heard upon the motion of the Plaintiffs for temporary injunctions prayed for in the Plaintiffs' verified complaint and upon the motions of the said Defendants, Carl A. Hansberry and Nannie L. Hansberry, his wife, Jay B. Crook and Hallie C. Crook, his wife, James Joseph Burke, Harry H. Pace, Supreme Liberty Life Insurance Company and Israel Katz, by their respective attorneys, aforesaid, to strike and dismiss the complaint for alleged defects and insufficiencies and to dismiss the complaint for want of Equity, and the court having read and considered the Plaintiffs' verified complaint and the objections of Defendants' counsel to Plaintiffs' motion for temporary injunctions, and having heard the arguments of all of the above named counsel for the respective Defendants to the alleged defects and insufficiencies of the Plaintiffs' complaint herein, and being now fully advised therein, finds that the Plaintiffs' said complaint is sufficient in law and Equity for the Defendants to plead or answer hereto; and it is therefore

Ordered that the motions of each and every of above named Defendants, Carl A. Hansberry, Nannie L. Hansberry, Jay B. Crook, Hallie C. Crook, James Joseph Burke, Harry H. Pace, Supreme Liberty Life Insurance Company and Israel Katz, to strike the Plaintiffs' complaint and to dismiss the suit, be and the same are overruled and denied, and that each of said Defendants plead [fol. 30] to or answer said complaint within Thirty (30) days from the date of the entry of this Order; and it is

Further Ordered that the Defendant, James Joseph Burke, his agents and attorneys and each of them, directly

or indirectly, desist and refrain from leasing to, bargaining with, selling, or attempting to lease, bargain or sell any real estate within the area described in the complaint herein as Washington Park Subdivision to negroes or to white persons for the purpose of leasing or selling such real estate to negroes, or placing negroes in such properties, until the further order of the Court in the premises; and it is

Further Ordered that the Defendant, Israel Katz, his agents and attorneys, and each of them, desist and refrain from selling or leasing the building known as 6018 Vernon Avenue, Chicago, Illinois, to negroes, or to any white person for resale or leasing to, or occupancy by negroes, except such janitors, chauffeurs, or servants actually employed as such for service in and about the said premises by the rightful owner or occupant of said premises until the further order of the Court; and it is

Further Ordered that the Defendants, Harry H. Pace, and Supreme Liberty Life Insurance Company, and each of them, their agents, officers or attorneys, and each of them, directly or indirectly, desist and refrain from making any further loans to negroes or to white persons for negro occupancy on real estate in said Washington Park Subdivision in Chicago, Illinois, shown by the records in the Recorder's Office of Cook County, Illinois, to be restricted by the Restrictive Agreement filed for record, February 1, 1928, as Documents 9914711, 9914712, 9914713 [fol. 31] and 9914714, until the further order of the Court; and it is

Further Ordered that the Defendants, Carl A. Hansberry, Nannie L. Hansberry, his wife, their servants, agents or attorneys and each of them, directly or indirectly, desist and refrain until the further order of this Court, from collecting or attempting to collect rent from the second and third apartments of the building commonly known as 6140 Rhodes Avenue, Chicago, Illinois, now occupied by the Defendants, W. T. Mooney and Elizabeth Cotzones, and from placing Negroes as tenants or in occupancy of the rooms on the second and third apartments of said building or in either of said apartments in case of the removal of said W. T. Mooney or Elizabeth Cotzones therefrom; and it is

Ordered that until the further order of this Court, during the period of their leases, the Defendants, W. T. Mooney

and Elizabeth Cotzones deposit and pay the rental provided by them to be paid, including the June and July, 1937 rent in the office of the Clerk of this Court, and in case of the removal of said W. T. Mooney and Elizabeth Cotzones, or either of them from said premises that the parties hereto shall apply to this Court for further direction;

The Court Further Finds that according to the verified complaint herein, the Defendants, Carl A. Hansberry and Nannie L. Hansberry, his wife, are unlawfully in title, possession and occupancy of the premises described as:

Lot twenty-seven (27) in Block Two (2) in the Resubdivision of Blocks Eleven (11) and Twelve (12) in the Re-[fol. 32] subdivision of the Washington Park Club Addition to Chicago in the South half (S½) of the South East Quarter (SE¼) of Section Fifteen (15) Township Thirty-eight (38) North, Range Fourteen (14), East of the Third Principal Meridian, commonly known as 6140 Rhodes Avenue, Chicago, Cook County, Illinois

and in violation of a Restrictive Agreement recorded February 1, 1928, as Documents 9914711, 9914712, 9914713 and 9914714; and it is

Therefore Further Ordered that said Defendants, Carl A. Hansberry, (herein sued as Paul A. Hansberry) and Nannie L. Hansberry, his wife, their servants, agents and attorneys, vacate and give up possession and occupancy of said above described premises or any part thereof, commonly known as 6140 Rhodes Avenue, Chicago, Illinois, within Ninety (90) days from the entry of this Order, until the further order of this Court and on failure to do so that a Writ of Assistance issue; and it is

Further Ordered that said injunction issue upon the Plaintiffs within 5 days from this date presenting to and filing herein an Injunction Bond in the sum of Five Thousand Dollars ($5,000.00) with good and sufficient security to be approved by this Court.

Enter: Feinberg, Judge.

Injunction Bond of plaintiffs showing approval by the Court.

JOINT AND SEVERAL ANSWER OF HANSBERRY AND WIFE—Filed December 15, 1937

The joint and several answer of Hansberry and wife is essentially the same as the joint and several amended answer of the said defendants herein subsequently ab-
[fol. 33] stracted except that said joint and several amended answer contains other and further material.

Objections of plaintiffs to the answer of defendants Hansberry filed January 14, 1938, is essentially the same as objections of plaintiffs to answer of defendants Harry H. Pace.

ANSWER OF HARRY H. PACE, DEFENDANT—Filed November 15, 1937

1. Denies that allegations of paragraph 1 of plaintiff's complaint, that five hundred white persons owners of real estate, etc., entered into a written agreement on the 30th day of September, 1927, or at any other time with respect to property generally described in paragraph 1 of the said complaint or with respect to the property described in paragraph 1 of alleged restrictive agreement set forth on page 2.

2. Admits that the alleged restrictive agreement set forth in paragraph 1 of said complaint provides that it shall be of no force or effect unless said agreement or a substantial similar agreement shall be signed by the owners above enumerated of 95 per centum of the frontage above described or their heirs or assigns and recorded in the Office of the Recorder of Deeds of Cook County, Illinois, on or before December 31, 1928.

3. Answering paragraph 2 of said complaint denies that 95 per centum of the owners of the frontage described in the alleged restrictive agreement signed said agreement and that the same was thereafter duly filed for record in the
[fol. 34] Recorder's Office of said County on February 1, 1928, and further denies that the conditions precedent in said agreement with respect to the execution and recording thereof were complied with in all respects and denies that other conditions with respect to execution, delivery or recordation necessary to the validity of such restrictive agreement were complied with; and further denies that the condition that "Time is of the essence of this contract and

all the terms, conditions and provisions hereof;" contained in said alleged restrictive agreement was complied with.

4. Admits the allegations in paragraph 4 of said complaint.

5. States that he has not sufficient information concerning the allegations contained in paragraph 5 and therefore neither admits nor denies said allegations, but demands strict proof thereof.

6. Admits that the premises are improved with the three-story and basement brick apartment residence; denies that the real estate described in paragraph 5 of the complaint is situated within an area covered by a valid restrictive agreement. States that the defendant does not have sufficient knowledge to answer allegations in paragraph 6, that Eva Somerman executed and acknowledged the alleged restricted agreement before the alleged recordation thereof; states that defendant does not know who occupied premises at 6140 Rhodes Avenue up to the 3rd day of May, 1937, nor does he know whether white persons exclusively owned and occupied the said premises up to the 26th day of May, 1937.

Denies that James Joseph Burke acted on behalf of the [fol. 35] defendant Carl A. Hansberry and Harry H. Pace and denies that the said Burke acting on behalf of said defendant Harry H. Pace or either of them fraudulently and knowingly and deceitfully represented to the First National Bank of Englewood or its officers that said premises would not be sold to a Negro or Negroes; and states that said First National Bank of Englewood sold said premises to Jay B. Crook, a white person; and denies that Burke acting for the defendants Carl A. Hansberry and Pace or for himself by fraud, deceit, misrepresentation, induced the officers of the First National Bank of Englewood to execute a conveyance of said premises to defendant Jay B. Crook, a white person, and denies that the conveyance by the First National Bank of Englewood was made with distinct understanding that said sale was not to be to a Negro; states that the sale of said premises to Crook was a bona fide purchase, transaction and sale and that the First National Bank of Englewood received the valuable consideration which it had bargained and contracted; admits that Crook is a white person but denies that Crook well knew when he accepted the deed from the First National Bank of Englewood dated May 15,

1937, recorded May 26, 1937, that said premises were actually being purchased on behalf of the defendant Carl A. Hansberry, denies that Crook was in unlawful conspiracy to violate the alleged restrictive agreement with defendant Harry H. Pace and procure a loan on said premises for the said Supreme Liberty Life Insurance Company; states that by the terms of the alleged restrictive agreement any mortgagee may lend money on the security of any property and [fol. 36] that lien of such mortgage whether recorded before or after the alleged restrictive agreement shall not be impaired or affected by such alleged restrictive agreement; that the making of a mortgage on the aforesaid premises at 6140 Rhodes Avenue permitted by the terms of the restrictive agreement was not an act in conspiracy or fraud in combination with defendants, Jay B. Crook, James Joseph Burke, this defendant or any other person; denies any and all acts of conspiracy, fraud or deceit on the part of himself or any person acting for him.

7. States that Crook was a bona fide purchaser of said premises and paid valuable consideration demanded by the First National Bank of Englewood, the seller, and denies that Crook obtained title by fraud and unlawful conspiracy and combination with the defendants Burke and Harry H. Pace for the sole purpose of violating the provisions and covenants of said alleged restrictive agreement; denies that Carl A. Hansberry conspired with and combined with Burke, this defendant Pace and Crook to obtain title to the premises at 6140 Rhodes Avenue, by fraud and unlawful conspiracy.

8. Denies that the Hansberrys had actual knowledge of the existence and validity of said restrictive agreement and proof thereof and Hansberrys perpetrated fraud and misrepresentation by moving to the first front building at 549 E. 60th Street; denies that Hansberry was directed to vacate said premises on account of any fraud and misrepresentation and states the fact to be that in the case involving the said premises 549 E. 60th Street, the Circuit and Appellate Court of Illinois merely decided the lease in [fol. 37] controversy in that case was void because it extended beyond the period of redemption and the term of receiver.

Denies occupancy of any other property in said area by any colored person is in violation of any law or any alleged

restrictive agreement; denies Burke has been conspiring with the defendant to place Negroes in possession of real estate in the alleged restrictive area; states that defendant has no knowledge of the making of the statement attributed to Burke in said paragraph 8 of said complaint and demands strict proof thereof; states that defendant is uninformed as to what extent, if at all, the defendant Burke was instrumental in the sale of 413 E. 60th Street or 6140 Rhodes Avenue.

9. States that he is not informed as to whether the plaintiffs Lee, Govanus and Anderson were parties to or signers to the alleged restrictive agreement before and at the time of the recording thereof and ask strict proof thereof; states that he is uninformed as to how these several plaintiffs obtained title to their respective property and is uninformed as to whether they are owners of said property and asks strict proof thereof; states that he is uninformed as to whether Burke was one of the signers of the alleged restrictive agreement; denies that the value of the property of the several plaintiffs had a total value of one hundred thousand dollars until the property at 6140 Rhodes Avenue was sold to the defendant. Defendant denies occupancy of the premises at 6140 Rhodes Avenue is a violation of any valid agreement on the part of the plaintiffs; denies that the tenants [fol. 38] of the plaintiffs are threatening to break or have broken their leases as a result of such occupancy and denies that alleged prospective tenants of Kathryn Luttrell refused to move into her apartment because of such occupancy.

10. Denies that alleged restrictive agreement has ever been in full force and effect; denies the allegations of complaint as to occupancy of property in area by white persons, states that building at 420 E. 60th Street is owned by colored persons and occupied by colored persons for 4 or 5 years and states that the building at 401 to 407 East 60th Street is occupied by colored persons and has been for several years; and states that a large number of buildings on South Park Avenue between 60th and 61st Street have been occupied by colored persons for 4 or 5 years, that the Southway Hotel at 6014 South Park Avenue contains a large number of colored tenants and has been used for a long period of time, that approximately 300 to 500 colored persons reside

in the alleged restrictive area and have been for a long period of time.

Defendant states, neighborhood of said restrictive area has changed since the date when the alleged restrictive agreement is supposed to have become effective, and the area has changed in respect to its occupancy by colored persons and at the time of the defendants' answer, November, 1937, large numbers of colored persons live in and own property thereon.

Defendant states that the neighborhood immediately adjacent, next to, abutting and adjoining the said alleged restrictive agreement has changed in the last 10 years so [fol. 39] that the area is surrounded on the South and West by more than 200 thousand (200,000) Negroes.

The defendant states that plaintiffs have acquiesced in numerous breaches and violations of the alleged restrictive agreement, and in the occupancy by large numbers of colored persons for several years within the alleged restrictive area so that because of the change in the abutting, adjacent and surrounding area and in the area itself, it would be harsh, unfair and unjust, burdensome and unequitable to enforce any such alleged restrictive agreement even if it were not invalid because of noncompliance with conditions precedent in said alleged restrictive agreement itself. Denies that the owners of the said alleged restrictive area are desirous that the agreement remain in full force and effect and states that on the contrary large number of white property owners in said area desire to sell their property in order to prevent its loss through mortgage and tax foreclosure because of low rentals obtained by them from white tenants; that plaintiffs who presented this action do not, have not, and cannot bring a representative suit and action because their interests are diverse, different and conflicting with those white property owners who desire to avoid certain loss of their property; that if plaintiffs are allowed to bring a representative suit they will thus be enabled to destroy the property rights of other members of the alleged restricted area; denies that plaintiffs bring a representative suit; denies that occupancy of the premises by the Hansberrys at 6140 Rhodes Avenue is in violation of any valid restrictive agreement and denies that property [fol. 40] is an extremely valuable section of the City of Chicago and denies that Hansberry's occupancy will depreciate

the property in value and denies that there are 550 parcels in alleged area.

12. Denies that the covenants contained in the alleged restrictive agreement should run with the land or that it was the intention of the alleged signers of the alleged restrictive agreement should run with the land and bind their respective heirs or assigns. Denies that covenants, restrictions and agreement contained in the alleged restrictive agreement run with the land and are binding upon the heirs or assigns of the parties to the agreement.

13. Denies allegations in paragraph 14 of plaintiffs' complaint.

14. States that he is uninformed as to the material contained in paragraph 15 of said complaint.

15. Denies material allegations of paragraph 16.

16. States that the alleged restrictive agreement is unconstitutional and void because it unreasonably interferes with the freedom of contract of white persons, as well as colored persons, who did not sign or execute the alleged restrictive agreement in respect to the sale and use of their property and property rights without due process of law in violation of Section 2 of Article 2 of the Constitution of the State of Illinois and likewise in violation of the 5th and 14th Amendment to the Constitution of the United States of America; because the said alleged restrictive agreement is unconstitutional and void for the reason that it expressly contemplates and provides for state action and the use of the State's agencies; its courts and public offices, in the enforcement of the said alleged restrictive agreement [fol. 41] thereby depriving the defendant and other citizens of Illinois and the United States of America of their rights and property without due process of law in violation of Section 2 of Article 2 of the Constitution of the State of Illinois and in further violation of the 14th Amendment to the Constitution of the United States of America; the said alleged restrictive agreement is against the public policy of the State of Illinois because it destroys the marketability of land, interferes with the free sale and use thereof, prevents improvements to land and property, encourages waste and disuse of property, discourages the payment of taxes to the State and its various instrumentalities, unsettles the

land titles of community and state and impedes the development of communities and tends to promote and perpetuate "slum" or so-called "blighted areas"; states that alleged restrictive agreement is unreasonable, illegal, and void because it unreasonably purports to restrict the use to which the defendant puts his own property, and thereby destroys his liberty, his freedom of contract, in violation of the Constitution of the State of Illinois and of the United States of America; and states alleged restrictive covenant is unreasonable, unlawful and void because it purports to include as assenting signatories, persons who did not sign the alleged restrictive agreement, and persons who were incapable legally of giving assent thereto; states the alleged restrictive agreement violates the rules against perpetuities; and is wholly void as being an invalid restraint on the alienation of real property.

17. Denies plaintiffs or any or either of them are entitled to any of the relief prayed for or any part thereof or any relief whatsoever in the said complaint therein demanded [fol. 42] and prays the same advantage of this answer as if he had pleaded or moved to strike and to dismiss the said complaint; prays that said suit and complaint of plaintiffs be dismissed and that plaintiffs and each of them be assessed a reasonable costs for and charges of the defendants in this behalf most wrongfully sustained.

Signed: Harry H. Pace, Earl B. Dickerson and Truman K. Gibson, His Attorneys.

Verified.

Answer of Defendant Israel Katz

The Answer of Israel Katz filed November 15, 1937, is essentially the same as the Amended Answer of Israel Katz, defendant, herein subsequently abstracted except that said Amended Answer contains other and further material.

Answer of James J. Burke

Answer of James Joseph Burke filed November 15, 1937, is essentially the same as the answer of the defendant Harry H. Pace except that said answer points out a variance be-

tween paragraph 1 of plaintiffs' complaint and alleged written agreement as to area described and in the description of the parties signatory, parties in the agreement being described as "undersigned owners of land on the one or the other side of Evans, Langley, Champlain, St. Lawrence, Eberhart, Vernon and South Parkway between 60th and 63rd Streets and on 60th, 61st and 62nd Streets between South Parkway and Cottage Grove Avenue in the City of Chicago; whereas in said paragraph 1 of plaintiffs' complaint it is represented that more than 500 white persons, owners of real estate on one or the other side of Champlain, St. Lawrence, Rhodes, Eberhart, Vernon and South Park Avenue between 60th Street on the North and [fol. 43] the first public alley North of 63rd on the South (except those parts of Champlain and Langley Avenues on 60th Street owned by the Board of Education of the City of Chicago, County of Cook, occupied by the Austin O. Sexton Public School) and on 60th, 61st and 62nd Streets between South Park Avenue in the area immediately west of Cottage Grove Avenue and on both sides of Langley and Evans Avenue between 61st Street and the first public alley north of 63rd Street.

2. Is essentially the same as the answer of Harry H. Pace answering paragraph 2 of said complaint and as to paragraph 3 of plaintiffs' complaint except that Defendant Burke states that it is not material whether 95 per centum of the owners of the frontage described in the alleged restrictive agreement signed, sealed and acknowledged said restrictive agreement and points out and states that the agreement provides for the signing "by the owners above enumerated of 95 per centum of the front above described or its heirs or assigns" which condition the Defendant Burke states was not complied with.

Defendants' answer to paragraphs 4, 5 and 6 are essentially the same as the answer of the Defendant Harry H. Pace except that the Defendant Burke states that Joseph G. Stoltz and the First National Bank of Englewood are not the parties signatory to the purported restricted agreement.

Paragraph 7 is essentially the same as the answer of the defendant Harry H. Pace.

Defendant Burke answering paragraph 8 of the complainant's complaint denies that he had actual knowledge of

[fol. 44] the existence and validity of the said restrictive agreement and provisions thereof; but states the fact to be that for a period of four months or more prior to the alleged transaction this defendant believed the purported agreement not to be in existence and valid; states that in the year 1928, he purchased through his wife, Mrs. Olive Ida Burke, the premises commonly described as 6039 Vernon Avenue, located in the alleged restricted area in the belief that the said purported agreement was valid and in existence, said belief being based upon the representations of the owner of record and officers of the Woodlawn Property Owners' Association and subsequent thereto to March 1, 1937, as alleged by plaintiffs, he served as President and Secretary of the said Association and one of the activities of said Association was the enforcement of the purported restricted agreement; that as alleged in plaintiffs' complaint, his wife, Olive Ida Burke, was complainant in the case of Olive Ida Burke vs. Isaac Kleiman, Gen. No. 567887, in the Superior Court of Cook County; that in said suit a stipulation as to facts was filed in said cause upon advice of attorneys for the plaintiffs that said stipulation, as will appear from the records and pleadings in the said cause, stipulated "95 per centum of the owners of the frontage of the area described" had duly entered into the agreement but said agreement was not proved by competent and lawful testimony, evidence and documentary proof; that the filing of said stipulation was upon the advice of the attorneys for the plaintiffs in said cause, and no investigation was conducted by this defendant, or the Woodlawn Property Owners' Association or by the [fol. 45] attorneys for the plaintiffs in said suit to determine whether the purported agreement was ever in fact in existence and valid by its terms, but in said suit this defendant acted in good faith.

That pursuant to his duties as President and Executive Secretary of the said Woodlawn Property Owners' Association, the defendant appeared as a witness and engaged in conference in respect to, suits to enforce the purported restrictive agreement in respect to properties referred to in plaintiffs' complaint; that he is familiar with the certain suit styled Phoenix Life Insurance Company vs. Berman, and parties signatory to the purported agreement as defendants, No. 35 S 7791 in the Superior Court of Cook County, that as will appear from the pleadings filed in said

cause in motion to dismiss was originally filed by the defendants, parties signatory to said agreement, setting up that the said agreement was obligatory upon the owner and mortgagee of the premises involved in said suit, but defendant states that the defendants in said suit being themselves unable to prove the existence and validity of the purported agreement agreed, upon advice of their attorneys to withdraw their motion to dismiss based upon existence and validity of the agreement, and agreed to the dismissal of the suit against them in order that no decree of Court might be entered finding the agreement to be non-existent and invalid after hearing, as will appear from the stipulation and motions filed in said cause.

Defendant states that in the Superior Court of Cook County in the case styled Cook vs. Yondorf, et al., No. 34 S 1261, which said suit was instituted by said Woodlawn [fol. 46] Property Owners' Association, he was a witness in the hearings before Master in Chancery Pollack; that said suit had been instituted to enforce the purported restrictive agreement and at the hearings as will appear from the records in said suit, the plaintiffs were unable to prove the purported agreement to be in existence and valid by competent and unlawful testimony and evidence; that the attorney for the defendants in said suit threatened to offer testimony in evidence that the purported agreement was not in existence and valid and thereupon plaintiffs entered into a stipulation under which the purported agreement did not have to be proven.

Defendant states that subsequent to and by reason of said hearings, he became doubtful of the existence and validity of said agreement, and did not on March 1, 1937, believe that the purported agreement was in existence and valid.

Defendant states that subsequent to the institution of the instant suit, he with other defendants caused an investigation to be made of the existence and validity of the purported agreement, and now more fully informed, has heretofore in his answer and here again denies the existence and validity of the purported agreement upon which plaintiffs' suit is based.

Denies that Hansberry was directed to vacate said premises on account of any fraud and misrepresentation on said Receiver, but states the fact to be that the Circuit

Court as well as the Appellate Court of Illinois merely decided the lease in controversy in that case was void because it extended beyond the period of redemption and term of Receiver.

[fol. 47] Denies that the occupancy of any other property in said area by any other colored person is in violation of any law or any alleged restrictive agreement. This defendant, further answering, denies that he since March 1, 1937, has been maliciously and wilfully conspiring with the defendant, Carl A. Hansberry, to place Negroes into possession of real estate in the alleged restricted area; and denies that the ownership and occupancy of real estate in said area would irreparably damage the real estate and properties within the Washington Park Subdivision. This defendant further answering denies all allegations charging fraud or conspiracy.

The answer of the defendant as to paragraph 9 of the said complaint and as to subsequent paragraphs of plaintiffs' complaint is essentially the same as the answer of Harry H. Pace, defendant, except that the defendant Burke in regards to paragraph 9, charges that in the case of Penoyer vs. Cohn, No. 34 S 16816, referred to by plaintiffs in their complaint a decree was obtained therein but the same has not been enforced and the premises are occupied by colored people.

(Signed) James Joseph Burke, Loring B. Moore,
His Attorney.

Verified as true in substance and in fact.

ANSWER

Answer of Supreme Liberty Life Insurance Company is essentially the same as the Answer of Harry H. Pace to the Complaint of the plaintiffs and the said defendant states in its answer that it is provided in the alleged written agreement that any mortgagee may lend money on the security of any property and that lien of such mort-
[fol. 48] gage shall not be impaired or affected by such alleged restrictive agreement.

MOTION TO DISSOLVE INJUNCTION

Petition of Defendants Carl A. Hansberry, and Nannie L. Hansberry to dissolve temporary injunction upon the coming in of their verified answer, denying allegations of plaintiffs' complaint and supported by affidavit of Truman K. Gibson, Jr., setting up as a result of investigation that condition precedent contained in agreement requiring execution, etc., by the owners of 95 per cent of the frontage was not complied with.

MOTION TO DISSOLVE INJUNCTION OF ISRAEL KATZ, NOVEMBER 15, 1937, STATES:

1. Complaint is without equity.

2. The defendants including Israel Katz, by their several and respective answers, traversed and denied the material allegations in the said complaint contained.

3. Alleged written agreement upon which plaintiffs' suit is based provides that the said agreement and restrictions therein contained shall be of no force or effect unless the agreement or substantially similar agreements shall be signed by the owners of 95 per centum of the frontage in described area, and the said condition precedent has not been compiled with as appears from the complaint of the plaintiffs and the answer of various defendants and the affidavits herewith, it thus appearing that the said alleged restrictive agreement was never entered into and never became effective or in force according to its own purported terms.

4. States that pleadings show laches and long and continued acquiescence by the plaintiffs in violations of the alleged restrictive agreement, abandonment, substantial [fol. 49] breaches, and waiver of right to enforce said restrictive agreement.

5. It appears from pleadings of plaintiffs and defendants Court lacked jurisdiction to enter order of July 8, directing issuance of an injunction.

6. Lack of reasonable probability that plaintiffs can prove case at hearing on merits.

7. States that from pleadings of parties, it appears that no immediate or impending irreparable injury and damage

which might be suffered by the plaintiffs will result because acts complained of had already been complained before injury was granted.

8. States that plaintiffs have adequate remedy at law and especially against the defendant Katz.

9. States that plaintiffs utilize remedy at law involving same subject matter in the case of Superior Court of Cook County, No. 37 S 7357, styled Louise G. Anderson vs. Carl A. Hansberry.

10. Paragraphs 10, 11, 12 13, 14, 15, 16, 17, 18, set up the various defenses in the various answers and motions of the several defendants and embraced particularly in the amended answer of Israel Katz.

MOTION TO DISSOLVE INJUNCTION

Motion to dissolve injunction of James Joseph Burke, November 15, 1937, contains some of the same material contained in the motion to dissolve by defendant Israel Katz.

MOTION TO DISSOLVE INJUNCTION

Motion to dissolve injunction of defendant Harry H. Pace filed November 15, 1937, contains essentially the same material as in the motion to dissolve of Israel Katz except that in addition the said motion especially sets up the pro-
[fol. 50] vision in the alleged restrictive agreement that "the lien of any mortgage or Trust Deed in the nature of a mortgage shall not be impaired or invalidated by reason of the breach of any of the provisions of this agreement whether any such breach shall have occurred prior to or subsequent to recording of any such mortgage or trust deed."

MOTION TO DISSOLVE INJUNCTION

Motion to dissolve injunction by Supreme Liberty Life Insurance Company filed, November 15, 1937, is essentially the same as the motion to dissolve the injunction by the defendant Harry H. Pace.

AFFIDAVIT

Affidavit of Irvin C. Mollison, filed November 15, 1937, states he is a practicing attorney, has examined the records of the Superior Court of Cook County and states that the plaintiffs in instant cause filed case No. 37 S 7357 with the same parties plaintiff and the same parties defendant as in the instant cause and said complaint was filed by Charles A. Churan, attorney in instant cause, and involves substantially the identical subject matter as involved in the instant cause, the said suit in Superior Court being a suit for defendants and is a suit at law.

Order filed November 15, 1937, granting leave to the defendants, Supreme Liberty Life Insurance Company, Harry H. Pace, James Joseph Burke and Israel Katz to file motions to dissolve injunctions and affidavits in support thereof.

Affidavits in support of motions to dissolve.

AMENDED ANSWER OF DEFENDANTS JAY B. CROOK AND HALLIE C. CROOK—Filed November 20, 1937

1. Defendants are not informed as to whether plaintiffs are residents of the City of Chicago and are not informed [fol. 51] as to whether a written agreement alleged in paragraph 1 of plaintiffs' complaint was entered into and therefore neither admit nor deny the facts alleged in paragraph 1 of said complaint but call for strict proof thereof.

2. Defendants state they did not sign or become party to agreement alleged in paragraph 1 of the complaint.

3. Defendants are not informed as to allegations in paragraphs 2 and 3 of said complaint and so neither admit nor deny, demand strict proof thereof. Defendants are informed and believe and therefore state the fact to be that the documents stated in paragraph 3 of said complaint were not signed by all the parties whose purported signatures appearing thereon; the names of the various persons were affixed to said documents by various persons who were not clothed with requisite authority to sign the names thereto which they did sign and said documents were also signed by various persons who had no title to any parcel or parcels of property included in said restricted area and there was

no delivery of said agreement in order to make the same effectual; and the said purported restrictive agreement, so appearing of record in the Recorder's Office of Cook County, Illinois, contained fabricated signatures and said documents were a mere sham and pretense filed for record by certain persons for their own purpose and convenience.

5. Defendants are not informed as to the binding force of said restricted agreement or as to whether Eva Someran was the owner of the record of the real estate described in paragraph 5 of said complaint and therefore neither admit [fol. 52] nor deny the allegations in paragraphs 4 and 5 of said complaint; call for strict proof thereof. Defendants admit real estate described in paragraph 5 to be improved as alleged. Defendants are not informed as to whether Eva Somerman executed and acknowledged said purported restricted agreement before the recordation thereof, and are uninformed as to other allegations in respect to other of the said premises and so neither admit or deny the allegation with reference thereto in paragraph 7 of said complaint and call for strict proof thereof.

8. Defendants are not informed as to allegations as to fraud and deceit of defendant Harry H. Pace in reference to the First National Bank of Englewood or representations made by defendant James Joseph Burke but denies any understanding between these defendants and the First National Bank of Englewood with reference to said conveyance except that these defendants did pay the purchase price thereof.

9. Defendants deny charges of unlawful conspiracy and combination with the defendant Harry H. Pace, President of the Supreme Liberty Life Insurance Company.

10. Defendants admit deed from the First National Bank of Englewood conveying premises to Crook was deposited in escrow with Chicago Title & Trust Company but deny that said deed was not delivered until May 26, 1937.

11. Defendants admit the execution and delivery of a trust deed to the Chicago Title and Trust Company as trustee conveying premises commonly known as 6140 [fol. 53] Rhodes Avenue, Chicago, Illinois, to secure their note for Four Thousand Four Hundred Dollars ($4,400) but are not informed and do not recall who was designated

as payee of said note secured by said mortgage and therefore neither admit nor deny the allegations in said complaint as to the identity of the payee; defendants are not informed as to whether Harry H. Pace, a Negro, is Secretary of the Supreme Liberty Life Insurance Company and are not informed as to whether Harry H. Pace is a Negro.

12. Defendants are not informed as to the relative time of filing of the quit claim deed of said Bank and trust deed to the Chicago Title & Trust Company and state the fact to be that said deed and trust deed was delivered to the Chicago Title & Trust Company as part of the plan by which the funds were obtained with which to pay the purchase price of said real estate and to vest good title in defendant Jay B. Crook.

13. Defendants deny conspiracy and combination with defendant Harry H. Pace, pursuant to which Harry H. Pace is a Negro to get possession of the first apartment in the basement of 6140 Rhodes Avenue in the evening of May 26, 1937. Defendants admit that by quit-claim deed dated May 27, 1937, they conveyed said premises to Carl A. Hansberry and Nannie L. Hansberry but are not informed as to what date it was recorded or the document number.

15. Defendants deny that defendant Jay B. Crook was not a bona fide purchaser of said premises and deny that he obtained title to said premises by fraud and by unlawful conspiracy with the defendants, James Joseph Burke, Carl [fol. 54] A. Hansberry and Harry H. Pace for the sole purpose of violating said purported restricted agreement and state the fact to be that the defendant Jay B. Crook purchased the premises and paid the purchase price therefor.

16. These defendants deny knowledge of existence and validity of the restrictive agreement.

17. Defendants are not informed as to allegations in charges of fraud of Carl A. Hansberry on receiver of premises, commonly known as 549 E. 60th Street and state the fact to be that they were not parties to any proceedings had and had no notice or information thereof except as informed in the complaint herein.

18. Defendants are not informed as to and neither admit nor deny allegations in paragraph 8 of the complaint as

to the moving into the building at 6140 Rhodes Avenue of the defendant Carl A. Hansberry but call for strict proof thereof.

19. Defendants have no knowledge as to unlawful occupancy of the premises known as 413 E. 60th Street, Chicago, Illinois, by Harry H. Pace, defendant, and neither admit nor deny allegations in respect thereto; call for strict proof thereof. Defendants are not informed as to complaint filed in the Superior Court in the case of Cook vs. Lutz, et al., No. 37 S 6290, in which Harry H. Pace is the defendant and neither admit nor deny the allegations in respect thereto; call for strict proof thereof and state that these defendants are not parties to said suit.

23. Defendants are not informed as to proceedings in Penoyer vs. Cohn, Superior Court Case No. 34 S 16816, and [fol. 55] neither admit nor deny allegations in paragraph 8, but demand strict proof thereof.

24. Defendants are not informed that James Joseph Burke is the husband of Olive Ida Burke, complainant in the case of Burke vs. Kleiman and are not informed as to whether James Joseph Burke resigned as Executive Secretary of the Woodlawn Property Owners' Association on March 1, 1937, and are not informed as to charges that the said defendant Burke conspired with Harry H. Pace and other Negroes to place Negroes in said purported restricted area and neither admit nor deny allegations in respect thereto but call for strict proof thereof.

25. Defendants are not informed as to charges of defendants to properties and neither admit nor deny allegations in said complaint in respect thereto call for strict proof, thereof. Defendants neither admit nor deny charges as to threats of James Joseph Burke and call for strict proof thereof.

27. The defendants have no information as to whether defendant James Joseph Burke was instrumental in the sale of 413 E. 60th Street and 6140 Rhodes Avenue and call for strict proof thereof.

28. Defendants are not informed as to allegations in paragraph 9 of said complaint and neither admit nor deny but call for strict proof.

29. Defendants deny that purported restrictive agreement has been in full force and effect since the same was executed and recorded and deny that the same is in effect now.

30. Deny that all properties except on a portion of South [fol. 56] Parkway between 60th and 61st Street- are owned and occupied by white persons.

31. Answer in paragraphs 31, 32, 33, 34 and 35 are essentially the same as the answer of defendant, Harry H. Pace, as to the matter therein answered.

36. Defendants are not informed as to whether parties who executed the said purported agreement did so for the purpose alleged by plaintiffs and neither admit nor deny the allegations in respect thereto but call for strict proof thereof; and say that said purported restricted agreement if valid and effectual as covenants running with the land speak for themselves and operate to allow or prevent the grantees in the deed executed by these defendants to become invested with the title to the premises described according to effect of said purported restricted agreement.

37. Defendants are not informed as to the allegations of paragraphs 13, 14, 15 and 16 of said complaint and neither admit nor deny allegations in said paragraph; call for strict proof thereof.

38. Deny that the plaintiffs are entitled to relief prayed and ask recovery of their costs.

(Signed) Jay B. Crook and Hallie C. Crook, Defendants. (Signed) Arthur A. Basse, Attorney for Defendants.

Verified.

JOINT AND SEVERAL AMENDED ANSWER OF CARL A. HANSBERRY AND WIFE, NANNIE L. HANSBERRY, FILED DECEMBER 15, 1937, IS ESSENTIALLY THE SAME AS THE JOINT AND SEVERAL AMENDED ANSWER OF ISRAEL KATZ EXCEPT THAT:

[fol. 57] In further answer to said paragraph 6, these defendants state that they are informed and believe, and therefore, state the facts to be that the deed from the First National Bank of Englewood conveying said premises to Jay B. Crook was deposited in escrow with the Chicago

Title & Trust Company of Chicago, but these defendants, upon information and belief, deny that said deed was not delivered until May 26, 1937.

In further answer to said paragraph 6, these defendants state that they are informed and believe, and therefore, state the facts to be that on May 19, 1937, the defendants, Jay B. Crook and Hallie C. Crook, his wife, executed and delivered a trust deed to the Chicago Title & Trust Company, as Trustee, conveying the premises commonly known as 6140 Rhodes Avenue, Chicago, Illinois, to secure their note for Four Thousand Four Hundred ($4,400.00) dollars, but these defendants, further answering, state that they have not sufficient knowledge upon which to form a belief as to who was designated as the payee of said note so secured by said mortgage and, therefore, require strict proof thereof.

In further answer to said paragraph 6, these defendants state that they have not sufficient knowledge upon which to form a belief as to the relative time of the filing of the quit-claim deed, dated May 27, 1937, from Jay B. Crook and Hallie C. Crook, his wife, and that the said deed was recorded on the date alleged in the complaint.

And said Answer further states that a prior action is pending between substantially the same parties involving the same which is in the Superior Court of Cook County, [fol. 58] case No. 37 S 7357, as in the instant case, plaintiffs in said case seeking damages. Attached to and incorporated by reference is the opinion delivered by the Appellate Court in Case No. 39368, Plath vs. Delaunty, et al. Appeal from Circuit Court, Cook County, said cause being referred to in plaintiffs' Complaint, stating that a receiver had no authority to make a lease beyond the period of redemption. (The defendants, Hansberrys had occupied premises under foreclosure in the restricted area under a lease for a period beyond the period of redemption.)

Signed by the defendants, Carl A. Hansberry, Nannie L. Hansberry. C. Francis Stradford, Attorney.

Verified.

Amended motion of Carl A. Hansberry and Nannie L. Hansberry filed December 15, 1937, to dissolve temporary injunction substantially the same as the motion to dissolve of Israel Katz.

Additional affidavits in support of motion to dissolve.

REPLY OF PLAINTIFFS, DECEMBER 17, 1937, TO AMENDED ANSWER OF CARL A. HANSBERRY, NANNIE L. HANSBERRY, JAY B. CROOK, HALLIE C. CROOK, AND TO ANSWERS OF JAMES JOSEPH BURKE, HARRY H. PACE, SUPREME LIBERTY LIFE INSURANCE COMPANY AND ISRAEL KATZ

1. Plaintiffs deny that 300 to 500 colored persons reside in the alleged restrictive area.

Allege actions are pending respect to properties referred to in the several defendants' answers.

[fol. 59] 2. Deny the change in the character of the neighborhood of the premises at 6140 Rhodes Avenue.

3. Deny laches, acquiescence and states that restrictive agreement provides that no restriction imposed shall be waived by any failure to enforce the provisions thereof no matter how many violations or breaches may occur.

4. Deny that by bringing representative suit they will be able to destroy the property rights of other white persons who were not grantors, or who did not execute said restrictive agreement.

— Deny that covenants in said restrictive agreement do not bind the heirs or assigns of those in privity with the signers.

6. Deny that signature of defendant Israel Katz was obtained by trick, misrepresentation or fraud; allege constructive notice to Katz and acquiescence by him and state that Katz is guilty of laches and estopped.

7. Deny that the agreement is unconstitutional and void in violation of Sections 1 and 2 of Article 2 of the Constitution of the State of Illinois or in violation of the 5th, 13th and 14th Amendments to the Constitution of the United States, and that agreement violates rule against perpetuities or deprives defendants of their equal rights in violation of Sections 1977, 1978, of Revised United States statutes.

8. Deny that agreement is contrary to public policy of the State of Illinois as expressed in Civil Rights Act or against the policy of the United States as expressed in Bill of Rights of the Federal Constitution, or any statutes of the United States of America.

[fol. 60] 9. Deny that suits to enforce said agreement have not been prosecuted diligently; state the fact to be that in addition to the decree, in the case of Burke vs. Kleiman, a decree has been entered in the Superior Court of Cook County, in the case of Cook, et al. vs. Yondorf, 34 S 1261, October 20, 1936, and in the case of Penoyer vs. Cohn, Gen. No. 34 S 16816, in the Superior Court of Cook County, May 6, 1936; that both decrees in these cases are res adjudicata on the question of validity of said agreement; say that even though some other actions against violations on South Park Avenue have been delayed by circumstances beyond their control such conditions are no defense to enforcement of agreement by plaintiffs and for their own proof.

10. Deny that defendants and their properties are not bound by the terms of restrictive agreement.

11. Deny that defendant, Supreme Liberty Life Insurance Company, was permitted by terms of the agreement or by the statute of the State of Illinois to loan its money on the security for any real estate in said area where said real estate is restricted by said agreement and states that loans made by the company were knowingly made for the purpose of violating terms of restrictive agreement and in violation of statutes of the State of Illinois.

12. Deny that said restrictive agreement is unconstitutional and void because it interferes with freedom of contract or that it is unlawful and illegal as restraint upon free alienation of land or unlawful restraint of trade.

[fol. 61] 13. Deny agreement lacks mutuality.

14. Deny allegations in paragraph 8 of Defendant Burke's answer; specifically states that averments of said defendant's answer as to the case of Burke vs. Kleiman, Phoenix Life Insurance Company vs. Berman and Cook vs. Yondorf are untrue.

15. Deny adequate remedy at law and deny that Anderson vs. Hansberry, Gen. No. 37 S 7375, Superior Court of Cook County, is between the same parties or for the same cause of action.

16. States that all the parties defendant except Supreme Liberty Life Insurance Company are persons in privity to the signing of said agreement as assignees of title of their

respective premises from original signers of said agreement and bound thereby.

17. States that defendants are estopped from denying execution, delivery, existence, compliance with conditions precedent, validity and enforcement of said agreement by a judgment and decree of the Circuit Court of Cook County, Illinois, in the case of Burke vs. Kleiman, Gen. No. 567687, October 2, 1933, affirmed in Appellate Court, First District, November 27, 1934, Gen. No. 37522, 277 Ill. App. 519; said action was filed by Olive Ida Burke on the 21st day of October, 1932, as a representative or class action.

18. Sets out in haec verba complaint filed October 31, 1932, in the case of Burke vs. Kleiman No. 567687, the material portions of which said complaint so far as the instant cause is concerned are as follows:

"Olive Ida Burke respectively represents unto the Court [fol. 62] that she filed this bill of complaint on behalf of herself and on behalf of all other property owners in the district covered and affected by the agreement hereinafter mentioned and who are, or whose grantors, direct or otherwise, were parties to said Indenture of agreement, and whose property interest will be adversely and injuriously affected by the violation hereinafter mentioned by the said defendants of the covenants and terms of said agreement."

Said agreement is the same as agreement sued upon in instant cause; alleges that agreement was signed by the owners of 95 per centum of the frontage described in restricted agreement and performance of conditions precedent. Alleges that Hannah Studdert, predecessor in title to premiess of Olive Ida Burke, plaintiff, and Ben Piser, predecessor in title to premises of Isaac Kleiman, et al., defendants, in said cause, executed alleged restrictive agreement; alleges violation of agreement by the defendants; alleges damages to properties due to violation, complained of and further damages unless enjoined.

Seeks restraining order and injunction until January 1, 1948, against the defendants; "that the Court may declare and decree the aforesaid agreement binding upon the said defendants, and the said covenant therein contained prohibiting said signers of said indenture from leasing, renting, conveying, licensing, selling to any person or persons of the Negro race, either directly or indirectly, and the re-

stricting of the use or occupancy of said three-apartment building and appurtenances thereto by persons of the Negro race and the said indenture of agreement to be a covenant [fol. 63] running with the land and binding upon the said defendants, Isaac Kleiman, Sam Kleiman, Jas. L. Hall and Chas. J. Sopkin, individually and as trustee, and all persons claiming under any conveyance made by them or either of them and all persons in privity with them and their attorneys, solicitors, agents and servants, and each and every of them."

Signed Olive Ida Burke, Complainant. H. E. Raymond, Her Attorney.

STATE OF ILLINOIS,
County of Cook, ss:

On this 20th day of October, A. D. 1932, before me personally appeared the above named Olive Ida Burke and made oath that she has heard read the above and foregoing Bill of Complaint by her subscribed and knows the contents thereof and that the same is true of her own knowledge, except as to those matters which are therein stated to be upon her information and belief, and as to those matters she believes it to be true.

(Signed) Fred L. Helman, Notary Public.

19. That said defendants Isaac Kleiman, Sam Kleiman, James L. Hall and Chas. J. Sopkin, having been duly served with process, filed their respective answers, which answers are set out in haec verba: (1. The Answer of the defendant, Isaac Kleiman, is not signed by the defendant and is not under oath, neither admits nor denies allegations in complaint; states that some of the dwelling houses other than this defendants' and within said restricted area have been [fol. 64] and are now being occupied by persons of the colored race and that said restrictions have long been abandoned and that complainant is not entitled to injunction therefor, and alleges change in character and condition of adjoining property as to render restrictions inapplicable, all of which defendant is ready and willing to maintain and prove. Charles J. Sopkin, his attorney.

Answer of Sam Kleiman, defendant, not signed by defendant and not under oath, neither admits nor denied allegations of complaint and sets up changed conditions of the neighborhood. Charles J. Sopkin, his attorney.

Answer of James L. Hall, defendant, not signed by defendant and not under oath, admits that he is the defendant, neither admits nor denies material allegations of plaintiffs' complaint, sets up abandonment and that there are colored occupants in other parts of said restricted area. Charles J. Sopkin, his attorney.

Answer of Charles J. Sopkin, defendant, signed by the defendant, not under oath, neither admits nor denies allegations of the plaintiffs' complaint. Charles J. Sopkin, attorney.

20. States that on June 7, 1933, parties to said proceedings in Burke vs. Kleiman, et al., before said Superior Court entered into a stipulation of facts which appears in the decree in paragraph 21 of this reply.

21. That the decree thereupon entered in said complaint of Burke vs. Kleiman on October 2, 1933, was in words and figures as follows, to-wit:

The decree in Burke vs. Kleiman, No. 567687, set out in [fol. 65] plaintiff's reply in the instant cause so far as same is material to issues in instant cause, is as follows: 1. This day comes the complaint of H. E. Raymond, first solicitor, and the defendants by Charles J. Sopkin, their solicitors;

Finds that it has jurisdiction of the subject matter of this cause and of the parties thereto; that the material allegations in said Bill of Complaint are true and that the equities of this cause are with the complainant and that said complainant is entitled to the relief therein and thereby prayed.

2. And the Court further finds that the parties hereto stipulated in writing upon the material facts to be considered by the Court as evidence to this cause, and upon which together with the pleadings in the case, the decree of this court should be based as follows:

Stipulated Facts. That on, to-wit, the 30th day of September, 1927, about 500 white persons duly executed and entered into a restrictive agreement, said white persons constituting and comprising more than 95 per cent of the owners of frontage described in said agreement, a copy of which is herein set forth, which agreement with respect to recordation and execution thereof was fully completed within the time set forth, and was on February 1, 1928, recorded in the

Recorder's Office of Cook County. Documents numbers and manner of recording are set up.

The agreement the same as agreement in instant cause was set out in said decree as a stipulation of facts.

That among the signatures the said agreement was one Hannah Studdert, predecessor in title to premises owned by complainant Olive Ida Burke.

[fol. 66] That among said signers of said agreement was also one Ben Piser, predecessor in title to premises owned by defendant, Isaac Kleiman.

Sets out the interest of Sam Kleiman as a mortgagee of Charles A. Sopkin, as trustee, and of James L. Hall, a person of Negro race, as defined in said restrictive agreement, as tenant.

Stipulates full knowledge and notice of agreement of the several defendants.

Stipulates that the real property in said agreement comprised an area extending from south side of 60th Street south to north side of 63rd Street inclusive, being a distance of three city blocks, inclusive, and from west side of Cottage Grove Avenue west to west side of South Park Avenue inclusive, being a distance of nine city blocks inclusive; that the frontage on the west side of South Park Avenue is the west boundary line of said area, all in City of Chicago, County of Cook and State of Illinois; stipulates that 6014 South Park Avenue, southeast corner of 60th Street and South Parkway and southwest corner are properties occupied by Negro tenants within restricted area and proceedings pending in reference to 6014 South Park Avenue and denial of petition to make the receiver in possession of southeast corner of 60th Street and South Park Avenue a party to injunction proceedings denied.

(End of stipulated facts.)

The Court further finds that the facts and each of them above set forth are true and constitute the evidence in this cause; that the indenture is a covenant running with the land and binding upon the defendants and each of them and [fol. 67] on the signers of said indenture of agreement, their grantees and assignees and upon all persons claiming under any conveyance made by them or either of them and to all persons in privity with them and their attorneys, solicitors, agents and servants, lessees and licensees.

That said indenture of agreement was in full force and effect on February 1, 1928, and all conditions therein contained with respect to execution and recordation thereof were fully complied with; and that the same was recorded, in the Recorder's Office of the Recorder of Deeds of Cook County, of Illinois, on February 1st, 1928, as Documents No. 9914711, No. 9914712, No. 9914713, and No. 9914714, respectively.

The Court further finds that said indenture agreement is and has been in full force and effect at all times since the first day of February, 1928, and that all terms of said indenture agreement are entirely valid and binding until January 1, 1948, and is binding upon the defendants and each of them and all persons claiming under any contract, agreement, assignment, lease, bill of sale, or other conveyance made by them or either of them, their attorneys, solicitors, agents and servants and each and every of them.

From which said foregoing Decree the defendants, the said Isaac Kleiman, Sam Kleiman, Jas. L. Hall and Chas. J. Sopkin, individually and as Trustee, pray an Appeal to the Supreme Court of Illinois, which appeal is granted to said defendants upon their filing a bond herein in the sum of Five Hundred Dollars ($500.00) within thirty days to be [fol. 68] approved by the court, and filing a Certificate of Evidence herein within sixty days from this date.

Enter:

(Signed) Robert E. Gentsel, Judge.

O. K. H. E. Raymond, Solicitor for Complainant.
O. K. C. J. Sopkin, Solicitor for Defendants.

End of Decree in Burke vs. Kleiman.

It is further ordered, adjudged and decreed that: James L. Hall and all persons of the Negro race holding under him vacate the said premises at 417-419 E. 60th Street, Chicago, and upon failure that a Writ of Assistance issued.

22. States that said decree set out in paragraph 21, was affirmed in the Appellate Court of Illinois, First District, reported in Volume 277, Illinois Appellate Court reports, page 519.

23. Sets out that the said decree in the Superior Court of Cook County, Illinois, in Burke vs. Kleiman, Gen. No. 567687,

and the affirmance thereof by the Appellate Court of Illinois was and remains in full force and effect; that said decree was duly rendered after due hearing on the merits and was enforced by a Writ of Assistance, issued out of the Office of the Clerk of the Court.

24. That said plaintiffs are ready to produce certified copies of said Bill of Complaint, answer thereto and the decree of the Superior Court and a certified copy of the opinion of affirmance of said decree in the Appellate Court of Illinois, First District.

Wherefore plaintiffs as to said answer of all defendants [fol. 69] and each of them say that the defendants ought not to be admitted to plead their respective answers as to so much of them and each of them as deny, dispute or contest the execution, delivery, existence, performance of conditions precedent, validity, force and effect of the said restrictive agreement because the plaintiffs say an estoppel by verdict exists in that they are res judicata and pray judgment that defendants are estopped by termination of the verdict and judgment of said Superior Court of Cook County in said case of Burke vs. Kleiman and affirmance thereof by Appellate Court from denying execution, delivery, existence, performance, validity, force and effect of said restrictive agreement as—res judicata.

Signed Charles A. Churan, Schuyler & Hennessy, Angus Roy Shannon.

Duly sworn to by Charles A. Churan, jurat omitted in printing.

OBJECTIONS TO AMENDED ANSWERS OF DEFENDANTS CROOK ET AL.—Filed January 14, 1938

Objections by plaintiffs to Amended Answer of defendants Jay B. Crook and Hallie C. Crook is essentially the [fol. 70] same as objections to answer of Carl A. Hansberry and Nannie L. Hansberry.

1. States that it is alleged in paragraph 8 of plaintiffs' complaint said restrictive agreement was decreed by the Superior Court of said County in the case of Olive Ida Burke vs. Isaac Kleiman, Gen. No. 587687, to be in full force and effect, which decree was affirmed by the Appellate Court of Illinois, First District, on November 27, 1934.

States that this allegation is not answered in defendants' answer; states that the cause of Burke vs. Kleiman was a representative action brought by plaintiff, Olive Ida Burke, on behalf of herself and on behalf of all other property owners in the district covered and affected by said agreement who are or whose grantors, direct or otherwise, were parties to said indenture, and that the decree in said Burke vs. Kleiman case is res adjudicata as to the validity, force and effect of said agreement.

That on interlocutory appeal of Hansberry and others in instant cause the Appellate Court said as follows: "The validity of the restrictive agreement in question was upheld by another division of this Court in Burke vs. Kleiman, 277 Illinois Appellate Court 519," that by said findings of the Appellate Court the question of validity of the restrictive agreement is res adjudicata.

3. States that in view of the decision of the Appellate Court on the validity of said restrictive agreement, the denials of said defendants in paragraphs 3, 8, 9, 10, 11, 12, 13, 16 and 17 and each of them are insufficient in law as a defense to this action.

[fol. 71] 4. States that the denial of the said defendants as to complaint are evasive and irrelevant.

5. That defendants do not answer allegations in paragraph 6 of complaint; that deed from the First National Bank of Englewood was escrowed with the Chicago Title and Trust Company and was not delivered to the defendant Jay B. Crook until May 26, 1937; or as to the execution of the trust deed from said Crook to the defendant said Supreme Liberty Life Insurance Company, of which defendant Pace is secretary, on May 19, 1937; that said deeds were recorded simultaneously; nor do they answer allegation that said premises were conveyed by the defendant Crook to the defendant Harry H. Pace by deed dated May 27, 1937; nor the allegation that Harry H. Pace took possession of the premises on May 26, 1937; nor that Harry H. Pace is a Negro and was occupying premises on the date of complaint filed herein.

6. States that defendants are estopped by the terms of the agreement from setting up any defense that said restrictive agreement has not been in full force and effect and

that same is not binding on the premises, 6140 Rhodes Avenue, or on the defendant Harry H. Pace, because defendants are successors in title to Eva Somerman, party signatory.

7. States that the defendants are successors and are so bound by the terms of said agreement and cannot attack the validity of the terms thereof.

8. Plaintiffs move to strike by reason of the foregoing objections from paragraphs 1, 3, 6, part of 8, part of 9, all of 10, 11, 12 and 16, all matter to the effect that said re-
[fol. 72] strictive agreement was not in full force and effect.

9. For same reasons to strike out in said paragraphs reference to the effect that said restrictive agreement is void.

10. For same reasons all references that the conditions precedent were not complied with.

11. To strike averments in answer as to occupation by colored persons outside of restricted area as immaterial, irrelevant.

12. To strike parts of defendants' answer saying that said agreement is unconstitutional and void for reasons alleged in paragraph 16 of said answer as unconstitutional, immaterial and irrelevant.

Objections *g*led January 14, 1938, to the Answer of James Joseph Burke is essentially the same as objections to Answer.

Filed January 14, 1938, objections to the Answer of Israel Katz, which is essentially the same as the objections to the Answer of Hansberrys.

Filed January 14, 1938, objections to the Answer of Harry H. Pace and Supreme Liberty Life Insurance Company is essentially the same as the objections to the Answer of Carl A. Hansberry and Nannie L. Hansberry.

Rejoinder

Filed February 14, 1938, the rejoinder of James Joseph Burke to the reply of plaintiffs: 1. States that paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of said reply are sufficiently answered

and the matters therein referred to put in issue by answer heretofore filed.

2. Denies that the cases therein referred to, Burke vs. [fol. 73] Kleiman, Cook vs. Yondorf, 34 S 1261, and Penoyer vs. Cohn, are res judicata on the question of validity of the alleged agreement.

3. Defendant states as to paragraphs 10, 11, 12, 13, 14, 15, same are sufficiently answered in his answer heretofore filed.

4. Defendant denies that he is a person in privity with the signers of the alleged restrictive agreement.

5. Denies that he is estopped from denying execution and delivery and existence and compliance with conditions precedent, validity and enforceability of said restrictive agreement by judgment in the decree in the Superior Court of Cook County in the case of Burke vs. Kleiman, Gen. No. 567687, or any affirmance of said decree in the Appellate Court of Illinois, General No. 37522, First District; denies that said action was in fact or in law a representative or class action.

Defendant answering paragraph 17 of plaintiffs' reply refers to allegations in paragraph 6 of answer of the defendant, James Joseph Burke, charges that said decree was obtained as set out in said defendants' answer and an examination of the pleadings in cause will show, by fraud and collusion and consent or friendly arrangement between respective attorneys for the respective parties in said suits, except that this defendant referring particularly to allegations and charges and the statement of this defendant in said paragraph 8 of answer so far as he may appear and did have knowledge of the arrangements in respect to said suits and decrees acted in good faith.

[fol. 74] States that plea of plaintiffs in respect to res judicata was not sufficiently averred in plaintiffs' complaint and that issues of execution, delivery, validity, etc., of said agreement have been definitely put in issue by the complaint of the plaintiffs and the answers of the defendant; that instant suit does not purport to be suit to enforce the said decrees in said suits referred to in said reply of said plaintiffs, but is an original suit involving the said issues now definitely in issue by plaintiffs' complaint and defendants' answer.

States that this defendant and other defendants were not parties to said suit; that neither Olive Ida Burke or any one of the defendants therein are parties signatory to the alleged restrictive agreement; that Olive Ida Burke could not in law and did not in fact bring a representative suit for the parties signatory to the alleged restrictive agreement; that the issues of representative and class actions and the execution, delivery, existence and compliance with conditions precedent, validity and enforcement of said restrictive agreement as to the parties signatory were not litigated in said suit; that said decree was not binding upon and does not bind any except actual parties to said suit and their privies; and the pleadings in said cause on behalf of the defendants therein did not put in issue the said issues and were not signed by the defendants themselves but by the attorney for said defendants and were not under oath; that complaint of said Olive Ida Burke therein was sworn to on information and belief, and there does not appear in said files in said suit that any sworn testimony or evidence was [fol. 75] taken; and that the sole basis of the decree was a stipulation of the facts which this defendant is informed and believed was approved only by the attorneys for the parties in said cause; and the decree in said cause similarly was approved and consented to solely upon said stipulation of facts by the attorneys for the parties.

That the complaint in Burke vs. Kleiman did not ask that the alleged restrictive agreement be declared in full force and effect as to all parties signatory and did not ask a finding that the alleged agreement be declared operative; and that conditions precedent to it being operative should be declared to have been complied with.

8. Defendant charges that appeal in Burke vs. Kleiman to the Appellate Court was in furtherance of the friendly arrangement and collusion for the parties in said cause.

Defendant prays that said reply so far as the same pleads res judicata be stricken.

James Joseph Burke, Defendant. Loring B. Moore, His Attorney.

Verified.

Rejoinder

Rejoinder of Israel Katz, filed January 15, 1938, is essentially the same as the Amended Rejoinder of said defendant,

Israel Katz, subsequently abstracted herein, except that said Amended Rejoinder contains other and further material.

ORDER OF JANUARY 15, 1938, SETTING DOWN CAUSE FOR HEARING ON MERITS AND RESERVING RULINGS OF COURT.

[fol. 76] This matter coming on to be heard on the plea of the counsel for plaintiffs that the case of Burke vs. Kleiman be held res judicata as to the issues involved herein, on certain objections filed to the answers, and motions of the several defendants to dissolve the temporary injunctions, heretofore issued herein, the court having examined the pleadings herein and heard the arguments of counsel for the respective parties and being fully advised in the premises.

It is hereby ordered that the matter proceed to a hearing and trial of the merits and that ruling of the court upon the above plea, objections and motions be reserved until after the cause has been heard on its merits; and

It is further ordered that the above material be and the same is hereby set down for hearing and trial on the merits on the 28th day of Febr.ary, A. D. 1937.

Jan. 15, 1937.

ORDER GRANTING LEAVE TO PLAINTIFFS TO FILE AMENDMENT TO COMPLAINT INSTANTER, THE SEVERAL DEFENDANTS' ANSWERS TO STAND OR LEAVE TO DEFENDANTS TO FILE AMENDED ANSWER AS DEFENDANTS MAY DESIRE.

AMENDMENT TO COMPLAINT—Filed March 7, 1939

Second: By striking out the first twelve (12) lines of Paragraph 1 and the words of "63rd Street" in thirteenth (13th) line on the first page of the original Complaint and inserting in their place the following, to-wit:

"1. That plaintiffs are all residents of the City of Chicago, County of Cook, and State of Illinois; that on, to-wit: the Thirtieth (30th) day of September, A. D. 1927, and on [fol. 77] the Second (2nd) day of January, A. D. 1928, more than five hundred (500) white persons, owners of land on one or the other side of Evans, Langley, Champlain, St. Lawrence, Rhodes, Eberhart, Vernon and South Park Avenues between 60th and 63rd Streets and on 60th, 61st and 62nd Streets, between South Park and Cottage Grove Avenues."

Third. By striking out the first two (2) lines of the sec-

ond (2nd) page of the original Complaint and inserting in their place the following, to-wit:

"(commonly known as the Washington Park subdivision) consisting of twenty-four (24) contiguous and adjacent city blocks, (except the land fronting on the North side of 63d Street, between South Park and Cottage Grove Avenues and on the West side of Cottage Grove Avenue between 63d and 61st Streets) and three (3) contiguous and adjacent city half-blocks."

Fourth. By inserting in the fourth (4th) line of Paragraph 2 on Page 5 between the words "owners" and "of" the words "therein enumerated."

Fifth. By striking out Paragraph 3 on the fifth (5th) page of said complaint and inserting in its place the following paragraph, to-wit:

"3. That the owners therein enumerated of ninety-five per centum (95%) of the frontage above described, signed, sealed, and acknowledged said Restrictive Agreement and thereafter the same was duly recorded in the Office of the Recorder of Deeds of Cook County, Illinois, on February 1, A. D., 1928, in Book 25525 of Records at Page 5 to 31, both inclusive, as Document No. 9914711, and on Pages 32 to 52, both inclusive, as Document No. 9914713, and on [fol. 78] Pages 117 to 188, both inclusive, as Document No. 9914714, and on December 28, A. D. 1928 in Book 26527 on Pages 484 to 487, both inclusive, as Document No. 10244725. That all conditions in said Agreement contained in respect to execution and recording thereof were complied with.

Seventh. By inserting in Paragraph 8, on Page 9 of the Complaint, before the words "which Decree was affirmed by the Appellate Court of Illinois, First District, on November 27, 1934" the following words, to-wit:

"As by the files, records and Decree of said Court in said cause, ready to be produced on the hearing of this cause, will more fully appear."

Charles A. Churan, Schuyler & Hennessy, Angus Roy Shannon, by Charles A. Churan, Attorneys for Plaintiffs.

Verified.

Subscribed and sworn to before me this 23rd day of February, A. D. 1938. Lena M. Bernstein, Notary Public.

AMENDED ANSWER

The sworn Amended Answer of Israel Katz, defendant was substantially as follows:

1. The defendant Katz denied that 500 white persons or any other number entered into the alleged restrictive agreement restricting the described area against ownership and occupancy by Negroes and states that the alleged restrictive agreement referred to in Paragraph 1 of the complaint never came into existence because the required frontage [fol. 79] consent of 95% of the total area was never obtained as required by the terms of the alleged agreement itself. The alleged restrictive agreement was void, a nullity, invalid, ineffective, non-existent, inoperative and of no force or effect because of failure to comply with the condition precedent contained in said alleged restrictive agreement; that the alleged agreement was never lawfully entered into by any property owners and was never binding upon anyone.

2. The purported owners or signers of said alleged agreement did not constitute the owners of 95% of the frontage of the area described in said alleged agreement.

3. The defendant further denied the execution of the alleged restrictive agreement denying that the owners of 95% of the frontage of said area ever signed, sealed, acknowledged or delivered said alleged restrictive agreement; the defendant further stated that the recorded documents recorded in Recorder's Office as documents Nos. 9914711, 9914712, 9914713 and 9914714 and recorded in Book of Records No. 25525, pages 5 to 188, both inclusive, were not an agreement of any sort, but were an arbitrarily pieced together, meaningless jumble of words, figures, paper and the like, without any legal meaning or binding effect whatsoever, the said recorded material not being or stating a valid agreement of any sort, but on the contrary being a confused, vague, uncertain, ambiguous and tricky jumble of words without meaning.

The defendant further denied that the conditions precedent contained in said alleged restrictive agreement itself were ever at any time complied with either in respect to the [fol. 80] execution by the owners of 95% of the frontage, with respect to the execution, delivery, recordation, or the manner and time of recordation, or with respect to other

provisions necessary to the validity of any such restrictive agreement; that it was expressly provided in said alleged restrictive agreement that it should be of no force or effect until it or a substantially similar agreement was signed by the owners above enumerated of 95% of the frontage described in said agreement and recorded in the Office of the Recorder of Deeds on or before December 31, 1928; defendant denied that the terms, conditions and provisions of the agreement were ever complied with; denied that the purported owners signed, sealed, acknowledged or delivered the alleged restrictive agreement recorded as document No. 9914711, but stated that the purported owners or signatories did not acknowledge the alleged restrictive agreement recorded as document No. 9914711; stated that there were no acknowledgments attached to document No. 9914711, but that the alleged paper or papers relied upon as acknowledgments were wholly separated or separate from the instrument which contained the signatures of the purported owners, and was likewise separated by a wholly different and foreign document recorded as document No. 9914712, which latter document was not and could not be a part of the alleged restrictive agreement, nor was it a counterpart or substantially similar agreement; that the said alleged or purported signatures of purported property owners to said alleged restrictive agreement recorded as document No. 9914711 were never in fact lawfully acknowledged; that the notaries public purporting to take such acknowledgments [fol. 81] did not personally know the various persons to be the real owners of the various parcels of property involved, and not personally knowing said persons to be the owners of the particular persons involved did not comply with Section 23 of the Conveyances Act and other provisions of the said Act; that said notaries did not know the said persons to be the real owners of the identical or particular parcels of property involved.

4, 5, 6, 7. Defendant denied that any restrictive agreement existed; denied that his or any other property described therein was included in any restricted area; denied that Eva Somerman acknowledged said alleged restricted agreement before the recordation thereof and further denied that a conspiracy could exist to violate an agreement which in fact did not exist and never came into being or existence.

8. Defendant further denied that any defendants had knowledge of the existence or validity of the alleged restrictive agreement because said agreement never existed; that although a decree had been entered in case of Burke v. Kleiman, No. 567687, Superior Court of Cook County, that nevertheless said decree in case of Burke v. Kleiman was based upon an alleged restrictive agreement which never existed, and that said decree had been obtained by fraud and collusion; that said decree of Burke v. Kleiman was not only fraudulent and collusively entered and obtained, but was also entered through error, mistake and inadvertence; said decree showing upon its face that the condition precedent and frontage consent requirement of 95% had never in fact been obtained, said decree showing merely that 95% of the owners of the frontage had consented rather [fol. 82] than the required owners of 95% of the frontage; that said case of Burke v. Kleiman was not a genuinely contested case, but said decree was obtained upon basis of pleadings which set up no real defenses although many were available and upon stipulation of facts and upon a further stipulation that no oral testimony or evidence would be taken; that other decrees had been obtained through fraud and collusion and were mentioned in said complaint; that said decrees had likewise been entered through mistake, error and inadvertence and misunderstanding of the court.

9. Defendant denied that plaintiffs would suffer irreparable injury to their property or rights.

10. Defendant further denied that all properties in alleged restricted area were occupied by white persons, but on the contrary that there were 600 or more colored persons living within the alleged restricted area and that said 600 colored persons had lived within such alleged area for periods of time ranging from three to five years or more; that a colored person owned 423 East 60 Street, just around the corner from his premises at 6018 Vernon Avenue which said building had been occupied by colored people for about five years; that 401-407 East 60th Street had been similarly occupied by colored people; that colored people had lived at the Southway Hotel containing 90 rooms for five years; that practically all of the buildings on both sides of South Park Avenue, between 60th and 61st Streets on both sides were occupied by colored people and had been for periods ranging from three to five years; that approximately 125

apartments in various buildings in said area had been occu-
[fol. 83] pied by Negroes for several years; that there had been a change in the neighborhood of the said alleged restricted area since February 1, 1928, which was about ten years from date of alleged restrictive agreement; that in addition to the change of neighborhood within said area itself the alleged restricted area was completely surrounded on three sides by communities and neighborhoods which had for five to ten years and more been occupied by colored people; that large numbers of colored people lived east of Cottage Grove Avenue and owned property there so that said alleged restricted area was completely surrounded by colored people; that plaintiffs had acquiesced in numerous breaches of alleged restrictive agreement and that by reason of these breaches, the change in the neighborhood, both within the adjacent, and surrounding said area, it would be harsh, unfair, unjust, burdensome, unduly oppressive and inequitable to enforce said alleged restrictive agreement even if it were not invalid, unlawful, non-existent, void and unenforceable for the other reasons mentioned in said answer.

Defendant further stated that large numbers of white persons, of which defendant was one, desired to sell their property in order to prevent its loss through mortgage and tax foreclosure, because the low rentals obtained by them from white tenants are insufficient to pay taxes, operating costs, interest and principal on mortgage indebtedness.

The defendant denied that plaintiffs brought a representative suit and denied that plaintiffs represented 500 white property owners; stated that large numbers of white property owners desire and wish to sell their property to Ne-
[fol. 84] groes; that plaintiffs cannot bring a representative suit, because the interests of the plaintiffs are conflicting, different and diverse from the interests of those white property owners (including defendant) who wished to sell their property to the only existing purchasers who were Negroes in order to avoid certain loss of their property; that if plaintiffs were allowed to bring a representative suit then the rights of the defendant and other white property owners would be destroyed, thus enabling one property owner whose interests were conflicting, to destroy the rights of others in different situations; denied that the alleged 500 white property owners were too numerous to be made individually parties to suit and described by name.

11. Defendant states that the alleged parcels of real estate within said alleged area would bring much larger rentals if rented or leased to colored people than said real estate brings at this time when rented to whites; denies that the property within said area would be greatly depreciated in value if Negroes occupied same, because much larger rentals could be obtained from colored tenants and the property values enhanced.

12, 13. Defendant denied that the alleged restrictive agreement should run with the land and denied that the alleged restrictions and agreement are covenants and restrictions which run with the land, because said agreement and alleged restrictions are not for the benefit of the land and real estate itself, and do not affect or touch the land and real estate as land and real estate, but rather are attempted restrictions against persons of a certain race or color numbering fifteen million American citizens; that such [fol. 85] attempted restrictions cannot be a covenant running with the land and binding upon the heirs, assigns or grantees of any alleged parties or signers of said agreement.

14. The Hansberrys were not unlawfully in possession of 6140 Rhodes Avenue there being no restrictive agreement in force or effect.

15. Answering paragraph 15 of the complaint, defendant admitted that he had title to 6018 Vernon Avenue, Chicago; further answering defendant stated that several years ago he signed a paper which was represented to be a petition by his neighbors for the improvement of the neighborhood; that the paper was a loose sheet of paper, not attached to any written, printed or typewritten matter of any sort; that he signed said petition, but was not informed by the person presenting the same that it was a purported restrictive agreement which would prevent him from selling, leasing or otherwise disposing of his property; that he was not shown any writing, typewritten or printed agreement of any sort containing any provisions, restrictions or agreement against the sale, conveyance or leasing of his property, nor was he informed that any agreement was to be affixed or attached to his said signature; that at the time of his signing he was informed and understood the paper to be a mere petition for the improvement of the neighbor-

hood; that his acknowledgment was not taken, nor did he thereafter appear before any person authorized to take oaths and acknowledge same; that defendant did not execute the alleged restrictive agreement mentioned in the complaint, but the signature of the defendant was obtained by trick, fraud, misrepresentation and stratagem, defendant never at any time understanding or intending to execute and [fol. 86] deliver any agreement which would prevent him from selling and disposing of his property; defendant denied that he ever executed and delivered the alleged restrictive agreement.

Defendant further answering paragraph 15 denied that on May 27, 1937, or any other time he threatened to sell his said building and premises to Negroes, but that he had a right to sell to anyone not being bound by any restrictive agreement; that said alleged restrictive agreement never existed, never was executed, never valid or of any force or effect according to its own terms, because of the failure to obtain the required 95% frontage consent; defendant further denied that he at any time placed the sale of his property with the defendant Burke and denied that he had any business dealings with the said James Joseph Burke regarding the sale of his property.

16. Defendant denied allegations in paragraph 16 of complaint and denied existence of a restrictive agreement.

17. Defendant further answering, stated that said alleged restrictive agreement even if it had been lawfully executed and entered into, was invalid as an illegal restraint on the alienation of land attempting unlawfully to prevent ownership and use of land in respect to a large and numerous class of American citizens numbering fifteen million or more; that the alleged restrictive agreement was unconstitutional and void, depriving defendant and other citizens and defendants herein of their rights and property without due process of law in violation of Sections 1, 2, and 20 of Article 2 of the Illinois Constitution and in further violation of 5th, 13th and 14th Amendments to U. S. Constitution; that [fol. 87] the alleged restrictive agreement is unconstitutional and void, because it unreasonably interferes with the freedom of contract of the defendant who is a white person as well as because the said agreement unreasonably restricts the use to which defendant and other citizens may put their property thereby destroying their liberty in violation of the

constitutional provisions above invoked; that the alleged restrictive agreement was likewise unconstitutional and void, because it purported to bind and include as assenting signatories, persons who did not sign the alleged restrictive agreement as well as persons who were incapable legally of giving assent thereto, and persons who had no power legally to give assent thereto; that the alleged restrictive agreement was contrary to the aims, objects and purposes as expressed in the Illinois and Federal Constitutions as well as contrary to and against the general welfare of the State and Nation.

18. The alleged restrictive agreement is void, because it violates Sections 1977 and 1978 of the Revised United States Statutes (8 U. S. Code Ann. 4142-3).

19. The agreement is an illegal restraint of trade in the land and property, real and personal, and violates the Statutes of the State of Illinois in its attempt to regulate or limit the quantity of land in the restricted area to be sold to a large and numerous class of persons numbering fifteen million.

20. The alleged restrictive agreement is against the public policy of the State and the United States as indicated by various Statutes, and as especially indicated in Sections 1, 2 and 20 of Article 2 of the Illinois Constitution, the Civil [fol. 88] Rights Act of the State of Illinois, the Bill of Rights of Federal Constitution, the 13th, 14th and 15th Amendments to the U. S. Constitution, Sections 1977 and 1978 of the Revised United States Statutes as well as other Federal and State Statutes prohibiting inequalities against citizens of the States and United States on account of race, creed or color.

21. Defendant further answering states that the agreement is against public policy, because it destroys the free use and marketability of land; encourages waste and disuse of property; prevents improvements and discourages the payment of taxes, unsettles the land titles of the particular area and makes the sale of land difficult; prevents the financing and sale of property; impedes the sound development of the community; promotes and creates slums and "blighted areas"; deprives 250,000 colored American citizens of housing by creating, promoting and maintaining an artificial and unnatural shortage of houses, residences and

apartments in the City of Chicago, when a block or two away from thickly congested areas of colored people there are large numbers of vacant dwelling places and apartments.

22. The defendant further answering stated that the agreement was wanting and lacking in mutuality and ought not to be enforced in a court of equity.

23. The defendant further answering, stated that the alleged restrictive agreement in its operation and effect is unreasonable, oppressive, discriminatory, harsh, unjust and inequitable and therefore unenforceable in a court of equity; that its enforcement would greatly inconvenience, [fol. 89] injure, hamper, interfere with and damage the defendant and the purported signatories, the community and public without any corresponding benefit or advantage to be gained; that specific enforcement of the agreement would be unconscionable, oppressive, unreasonable, discriminatory and inequitable and would irreparably injure and damage the defendant as well as other white property owners and colored people desiring to purchase said properties as homes.

24. Defendant further answering stated that the agreement was vague, uncertain, indefinite, confusing, incomplete, defective and contradictory and therefore void and unenforceable; that because of its vagueness and indefiniteness and uncertainty, land titles would be unsettled and therefore the agreement was against sound land policy.

25. That plaintiffs have been guilty of laches and have acquiesced in numbers of breaches and violations very close to defendant's property at 6018 Vernon Avenue, which is immediately behind South Park Avenue where said violations occurred, separated only by a narrow alley; that plaintiffs have waived and lost their right to specific performance even if the covenant existed because of laches, waiver, abandonment, acquiescence in breaches and violations on 60th Street as well as on South Park Avenue; that suits filed were not diligently prosecuted and the continued occupancy of the restricted area by 600 or more colored persons amounts to laches, waiver, and abandonment of the agreement, even if one had existed; that because of the numerous violations, if any agreement existed, because of the continued presence of large numbers of colored people for nearly

[fol. 90] five years or more the alleged restrictive agreement had been rendered ineffectual, nugatory, oppressive, unreasonable and unduly burdensome, even if it had not been non-existent, invalid and void for other reasons.

26. After setting forth defenses found in the defendant's motion to dismiss the complaint (found in other parts of the abstract of record), the defendant denied that the said alleged concurrent, counterpart or substantially similar agreements constitute one restrictive agreement; that the respective signers of the alleged concurrent, counter-part or substantially similar agreements did not covenant nor agree with each other and among themselves in respect to any restrictions whatsoever against ownership, use and occupancy of their several and respective alleged parcels of real estate in the said alleged restricted area; that the alleged agreement is a nullity, of no force or effect and never at any time binding upon the purported signatories, because there was no meeting of the minds and no certain and definite unity of intention and agreement, at any definite time, and as a consequence said agreement was never at any time binding upon the heirs, executors, administrators, grantees, assigns, or lessees of the said purported signatories.

27. Defendant denied that plaintiffs or any or either of them were entitled to any of the relief prayed for in paragraph 17 of the complaint; denied that a temporary or permanent injunction should issue against defendants or any of them; denied that he should be restrained from selling or leasing his property; denied that he should pay costs; and moved again that the complaint and cause should be [fol. 91] dismissed with costs assessed against plaintiffs; that the temporary injunction be dissolved and damages and costs assessed against plaintiffs.

Verification by defendant Katz that the statements by him in paragraphs 5 and 9 of the Amended Answer to the effect that he had no knowledge sufficient to form a belief as to the truth of certain allegations in complaint, are true.

Verification by Defendant Katz upon his oath that the foregoing answer by him subscribed was true in substance and in fact.

AMENDED REJOINDER OF ISRAEL KATZ FILED JULY 14, 1938

1. This defendant states that the premises at 423 East 60th Street, City of Chicago, are not only occupied by three families of colored citizens, but is likewise owned by Russell L. Black, a colored person; that the twenty-four apartment building at 425-7 East 60th Street and 6004-6014 Vernon Avenue, City of Chicago, is owned by colored persons, and occupied by 24 families of colored persons.

2. This defendant states that the character of the neighborhood in which the defendant Israel Katz's property at 6018 Vernon Avenue is located, has changed and is rapidly changing in respect to the occupancy by white and colored persons; that the twenty-four apartment building at 425-7 East 60th Street and 6004-6014 Vernon Avenue, is immediately adjacent, abutting and next to the property of this defendant at 6018 Vernon Avenue; that the aforesaid twenty-four apartment building is owned by colored persons as aforesaid, and is now occupied by at least 24 colored fami- [fol. 92] lies; that the said twenty-four apartment building is separated from this defendant Israel Katz's property by a small and narrow alley; this defendant further answering states that the character of the neighborhood of the alleged restricted area mentioned in the complaint is changing in respect to occupancy by white and colored persons.

3. This defendant further answering states that paragraphs 3, 4 and 5 of the reply are sufficiently answered and traversed and the matters therein referred to put in issue by the defendant's answer heretofore filed.

4. The defendant, Israel Katz, denies that he executed at any time any alleged restrictive agreement as mentioned in the complaint, and states that he is not and has never been bound by any alleged restrictions therein contained, there being no restrictive agreement, but states that his signature was obtained by trick, stratagem, misrepresentation and fraud as stated in his answer; this defendant further answering denies that he has had either personal or constructive notice that his property at 6018 Vernon Avenue, City of Chicago, was covered by any alleged restrictive agreement, but states that his property has never been bound by any said alleged restrictive agreement nor

any restriction therein contained, there being no restrictive agreement in existence, and further answering denies that he has ever acquiesced therein; this defendant further answering denies that he has taken advantage of the alleged benefits of any alleged restrictive agreement, but states that there have been no benefits whatsoever to any alleged property owners signing said alleged restrictive agreement, but on the contrary, the said alleged restrictive agreement, [fol. 93] if observed by any property owner, has resulted in damage and loss to them because of low rentals, and through mortgage and tax foreclosures caused by such low rentals as stated in the defendant's answer; and this defendant further answering denies that he has been guilty of any laches and denies that he is estopped from raising any defense which he might have; that this defendant was not apprised of the fact that any one claimed that he had signed any alleged restrictive agreement until after this proceeding was filed and until quite recently; that not ever having signed the alleged restrictive agreement, and not being bound thereby, and his property not being subject thereto, and no restrictive agreement in fact existing, he cannot be lawfully estopped from raising and interposing any defense whatsoever which may be available, and any estoppel against this defendant, Israel Katz, would be a denial of his rights and a deprivation of his property without due process of law in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and the 5th, 13th and 14th Amendments to the Constitution of the United States of America, and other statutory provisions of the State of Illinois and the United States of America.

5. That paragraphs 7 and 8 of the reply are sufficiently answered and traversed and the matters therein referred to put in issue by his answer heretofore filed.

6. This defendant denies that the decrees in the cases of Burke vs. Kleiman, Cook vs. Yondorf and Penoyer vs. Cohn, mentioned in paragraph 9 of the reply, are adjudicata on the question of validity of the alleged restrictive [fol. 94] agreement and denies that said decrees are binding on this defendant, or any one else but states that the execution, delivery, existence, performance or conditions precedent, required by said alleged restrictive agreement befor it should be of force or effect were not proved by several plaintiffs but that on the contrary said decrees were ob-

tained by fraud; that said plaintiff Cook and his attorneys attempted to prove the execution of the alleged restrictive agreement in the case of Cook vs. Yondorf, but abandoned the attempt and were unable to do so and that said decree in Cook vs. Yondorf was entered by consent, friendly arrangement, compromise and settlement.

This defendant states that the matter of res judicata is not lawfully or properly raised by plaintiffs in said reply or by means of objections filed by them to defendant's answer, or properly or lawfully raised by means of said decrees aforementioned.

8. This defendant denies that this defendant, Israel Katz, is in privity to or with the signers of any said alleged restrictive agreement; that this defendant did not sign nor execute the said restrictive agreement mentioned in the complaint and has no legal relationship or connection whatsoever with any of the defendants herein named, or with any of the plaintiffs herein named or with any of the alleged signers of the alleged restrictive agreement, and hereby denies any and all privity whatsoever with any person or persons mentioned or referred to in the complaint or in the reply.

10. Defendant Further Answering paragraph 17 of the reply denies that he or any of the other defendants men- [fol. 95] tioned in paragraph 17 are estopped from denying the execution, delivery, existence, compliance with conditions precedent, validity and enforceability of the aforesaid restrictive agreement by the judgment and decree of the Superior Court of Cook County entered in the case of Olive Ida Burke vs. Isaac Kleiman, et al., Case #567687, and as therein further described in said paragraph 17, and denies that this defendant or any of the other defendants are estopped by any affirmance of the aforesaid decree in the Appellate Court of Illinois, No. 37522; this defendant further answering states that an examination of defendant Burke's answer and of the pleadings in the said cause of Cook vs. Yondorf and of the pleadings, decree and stipulation of facts also set out in paragraph 18 of the reply, will establish and show that the decrees in Burke vs. Kleiman and Cook vs. Yondorf were obtained by fraud, collusion, consent and friendly arrangements between the respective attorneys for the respective parties in said suits; that only issue in the aforesaid case of Burke vs. Kleiman was the

question of whether or not three or four violations of the alleged restrictive agreement constituted such a change in the character of the neighborhood as to make inequitable the enforcement of the alleged restrictive agreement; that the execution, delivery, and existence of the said alleged restrictive agreement and the compliance with conditions precedent, and the validity of such an alleged restrictive agreement were not in issue, were not controverted, and were not contested as issues of fact or law in said case of Burke vs. Kleiman, but only the issue of change in the character of neighborhood was involved and a few facts were stipulated [fol. 96] to in respect to that issue; that the execution, delivery, existence and the compliance with conditions precedent as required by the said alleged restrictive agreement were not proved by any competent or lawful testimony in said case of Burke vs. Kleiman nor were they proved in the case of Cook vs. Yondorf or any other case.

This Defendant Further Answering paragraph 17 denies that the said action filed by Olive Ida Burke is the case of Burke vs. Kleiman, #567687, in the Superior Court of Cook County, was representative or class action, either in law or in fact; that the said Olive Ida Burke was not a signer of the said alleged restrictive agreement, nor were the Kleimans or any of the other defendants signers of the said alleged restrictive agreement; that the said action was not representative either of the said alleged signers of the said alleged restrictive agreement or of the property owners in the said alleged restricted area; that the grantor of Kleiman was not made a party nor were any other alleged or purported signatories of the said alleged restrictive agreement; that the said decree in the case of Burke vs. Kleiman makes no mention of any representative suit or action; that neither the plaintiffs nor any other plaintiff who claims to be a signatory to the alleged restrictive agreement nor any other person have ever at any time proved the execution, delivery and existence of the alleged restrictive agreement or the compliance with the conditions precedent therein contained, nor has the validity of the said alleged restrictive agreement ever been passed upon; that the said plaintiffs have alleged the execution, and existence of the said alleged [fol. 97] restrictive agreement, and have purported to allege compliance with conditions precedent, which have been denied by this defendant and other defendants herein, which issues of execution, delivery, existence, compliance with con-

ditions precedent, validity and enforceability of said restrictive agreement must be maintained and proved by the plaintiffs; that this suit is an original suit involving the aforementioned issues, and is not a suit to enforce the decree referred to in paragraph 17 of the reply and the claim or pleas of res judicata cannot now be lawfully raised.

This Defendant Further Answering paragraph 17 of the reply states that the pleadings in the said cause filed on behalf of the defendants herein were not signed by the defendants themselves, but by the attorney for the said defendants and were not under oath; that the complaint of Olive Ida Burke was upon information and belief; that the sole basis of the decree in the case of Burke vs. Kleiman mentioned in paragraph 18 of the reply was the stipulation of facts which was signed and approved solely by the attorney for the parties in said cause; that the decree in said cause similarly was approved and consented to, and entered solely upon the stipulation of facts by the attorneys for the parties; that the pleadings in the said cause show that the execution, delivery, existence, compliance with conditions precedent, and the validity of the said alleged restrictive agreement were not controverted, litigated or contested by the parties, but present only the issue of a change of character in the neighborhood.

This Defendant Further Answering states that the pleadings in said case of Burke vs. Kleiman did not put in issue the issues of representative or class action, nor did the pleadings in said case put in issue the execution, delivery, [fol. 98] existence, and compliance with conditions precedent, validity, and the enforcement of said restrictive agreement as to the parties signatory were not litigated in said suit; and issues of fraud in procurement of signatures to said alleged restrictive agreement, validity of acknowledgments, identity of property owned by purported signers for same, material alteration of alleged instrument, proof of signers as signatures of real owners and acknowledgments of same, manner of recording said instrument, physical or mechanical make up or structure of said and alleged instrument were not litigated in said case of Burke vs. Kleiman or any other case that the pleadings did not put in issue the said issues; that there was no sworn evidence or testimony taken in case of Burke vs. Kleiman to support said decree but on the contrary a stipulation not to take oral evidence; that the sole basis of said decree was a stipulation of facts

which was approved solely by the attorneys and was without the authority of the parties defendant themselves; that said stipulation of facts in said case was unlawful and void; that an appearance was entered for one or two defendants without authority of the defendants themselves.

This Defendant Further Answering states that the decree in Burke vs. Kleiman merely found that 95% of the owners of the frontage had signed said alleged restrictive agreement (which finding was not based on evidence or proof but on unlawful and unauthorized stipulation of facts) but did not find that the owners of 95% of the frontage of the area had signed said alleged restrictive agreement and did not find that the condition precedent contained in said alleged restrictive agreement had been complied with; that said [fol. 99] decree was not only obtained by fraud and collusion but was entered by the court through mistake, error, inadvertence and misunderstanding as to the material facts involved in said proceeding.

And This Defendant Further Answering states that the proceedings in case of Burke vs. Kleiman was a dummy procedure conceived in fraud to have the alleged agreement declared invalid; that a decree obtained by fraud and dummy proceeding cannot be lawfully or equitably raised by plaintiffs or anyone else as res judicata and any estoppel against this defendant based upon any such fraudulent decree or decrees would deprive this defendant and others of their property and their rights without due process of law in violation of Section 2 of article 2 of the Constitution of the State of Illinois and in further violation of the 5th, 13th, and 14th amendments to the Constitution of the United States of America.

11. This Defendant Further Answering paragraph 23 of the reply denies that the decree of Burke vs. Kleiman therein referred to was rendered after full hearing on the merits as to each and every of the matters set forth in the pleading, therein, but states that the only issue involved was an issue of the change in the character of neighborhood, facts in respect to which were not even proved by the parties, but merely stipulated to, no other issues of facts or law being involved in said case and in said decree; that the said decree in Burke vs. Kleiman and the decrees in all of the other cases mentioned in the reply were obtained by fraud and collusion and under such circumstances as make

[fol. 100] the said decrees unavailable as a basis for the plea of res judicata raised in the said reply.

12. This Defendant Further Answering denies that this defendant, Israel Katz, and the other defendants, all and each of them, ought not to be admitted to plead his and their several and respective answer, or so much of them as deny, dispute, or contest the execution, delivery, existence, performance of conditions precedent, validity, force and effect of the said alleged restrictive agreement, and denies that this and other defendants herein are estopped by verdict, judgment or decree, and denies that this and other defendants are estopped by any affirmance thereof by the Appellate Court from denying the execution, delivery, existence, performance of conditions precedent, validity, force and effect of said restrictive agreement as may be adjudicata.

13. This Defendant states that the said reply of the plaintiffs is incomplete, defective, and insufficient in law and in fact and ought to be stricken, and this defendant does hereby move to strike the reply of the plaintiffs, and does hereby move for the entry of judgment, and this defendant states that objections to this defendant's answer are unlawful, improper and insufficient and he hereby moves to strike said objections as unlawful, insufficient and improper.

Signed by defendant, Israel Katz, verified as true in substance and fact.

Affidavit of attorney that not interposed for delay.

Rejoinder

The Joint and Several Rejoinder of Carl A. Hansberry, Nannie L. Hansberry, Supreme Liberty Life Insurance [fol. 101] Company, a corporation, and Harry H. Pace, President of Supreme Liberty Life Insurance Company, filed July 14, 1938, is essentially the same as the Rejoinder of James Joseph Burke, except that said Rejoinder further states that to deny these defendants or any or either of them the right in this case to attack the proper and sufficient execution delivery compliance with conditions precedent, validity and enforcement of the restrictive agreement which the plaintiffs in their complaint seek to enforce were in fact denied to said defendants and each of them due process and equal protection of the law in violation of Sec-

tions 2, Article 2 to the Constitution of the State of Illinois and of Sections 2 of the 14th Amendment to the Constitution of the United States.

Signed: Carl A. Hansberry, Nannie L. Hansberry, Harry H. Pace, Supreme Liberty Life Insurance Company, Verified.

Reply to Amended Answer of Israel Katz filed June 14, 1938, contains matter already set out in various pleadings of the plaintiffs herein.

Objections of plaintiffs to Joint and Several Rejoinder of several defendants contains matter already set out in various pleadings of the plaintiffs herein.

Decree entered on the 19th day of August, 1938.

[fol. 102] In Circuit Court of Cook County

General Number 37C6804 In Chancery

Anna M. Lee, Edward L. Govanus, et al.

vs.

Carl A. Hansberry, Nannie L. Hansberry, et al.

Decree—August 19, 1938

1. Now comes the plaintiffs, Anna M. Lee, a widow, Edward L. Govanus, Esther Govanus, his wife, Louise G. Anderson, a widow, Lyman M. Anderson, her son, and Kathryn Luttrell, a spinster, by Charles A. Schuran, Schuyler & Hennessey, and Angus Roy Shannon, their attorneys, and the defendants, Carl A. Hansberry, and Nannie L. Hansberry, his wife, by C. Francis Stradford, their attorney; the defendants, Jay B. Crook and Hallie C. Crook, his wife, by Arthur A. Basse, their attorney; defendant James Joseph Burke, by Loring B. Moore, his attorney; the defendants, Harry H. Pace and Supreme Liberty Life Insurance Company, a corporation, by Earl B. Dickerson and Truman K. Gibson, Jr., their attorneys and the defendant, Israel Katz, by Irvin C. Mollison, his attorney.

2. And this cause coming on to be heard upon the complaint and amendment thereto, the answers of the defendants, James Joseph Burke, Harry H. Pace, Israel Katz

and Supreme Liberty Life Insurance Company; the amended answers of the defendants, Carl A. Hansberry, Nannie L. Hansberry, Jay B. Crook and Hallie C. Crook, [fol. 103] the objections of plaintiffs to the amended answer of defendants, Carl A. Hansberry, Nannie L. Hansberry, their objections to the several answers of the defendants, Harry H. Pace, Supreme Liberty Life Insurance Company and Israel Katz; the objections to the amended answer of the defendants, Jay B. Crook and Hallie C. Crook, the reply of the plaintiffs to the amended answers of the defendants Carl A. Hansberry, Nannie L. Hansberry, Jay B. Crook and Hallie C. Crook, and to the respective answers of the defendants, James Joseph Burke, Israel Katz and Supreme Liberty Life Insurance Company, and the rejoinder of the defendant, James Joseph Burke, to said reply and upon the exhibits and proofs received in evidence.

3. And the Court having heard and considered the evidence and proofs offered and taken, the arguments of the attorneys for the respective parties, the pleadings and exhibits in the case, and being now fully advised in the premises, finds that it has jurisdiction of the subject-matter of this cause of the parties thereto; that the material allegations of the plaintiffs' Complaint as amended are true; that the equities of this cause are with the plaintiffs and that said plaintiffs are entitled to the relief prayed for in their Complaint as amended, and that the temporary injunction heretofore entered, be and it is hereby made permanent.

4. And the Court further finds that the plaintiffs and the defendants are all residents of the City of Chicago, County of Cook and State of Illinois; that on, to-wit: the 30th day of September, A. D. 1927, more than five hundred (500) white persons, owners of real estate on the one or the other side of Evans, Langley, Champlain, St. Lawrence, [fol. 104] Rhodes, Eberhart, Vernon and South Park Avenues between 60th and 63rd Streets, and on 60th, 61st and 62nd Streets, between South Park Avenue and Cottage Grove Avenues in the City of Chicago, County of Cook and State of Illinois, entered into, signed and executed a certain written agreement hereinafter referred to as "Restrictive Agreement," which, except as to the signatures and notarizations thereof, is in words and figures as follows, to-wit:

"This Agreement entered into this 30th day of September, 1927, by and between the undersigned owners of land on the one or the other side of Evans, Langley, Champlain, St. Lawrence, Rhodes, Eberhart, Vernon and South Park Avenues, between 60th and 63rd Streets and on 60th, 61st and 62nd Streets between South Park and Cottage Grove Avenues, in the City of Chicago, witnesseth, that

And, Whereas, the parties hereto feel that the restrictions and covenants hereinafter imposed and created are for the best interests of all the parties hereto and of the property hereinafter described.

In Consideration of the premises and of the mutual covenants hereinafter made, and of the sum of Five Dollars ($5.00) in hand paid to each of the parties hereto by each of the other parties hereto, the receipt of which is hereby acknowledged each party as owner of the parcel of land above described immediately under his name, does hereby covenant and agree with each and every other of the parties hereto, that his said parcel is now and until January 1st, 1948, and thereafter until this agreement shall be abrogated as hereinafter provided, shall be subject to the restrictions and provisions hereinafter set forth, and that he will make no sale, contract of sale, conveyance, lease or agreement [fol. 105] and give no license or permission in violation of such restriction or provisions, which are as follows:

1. The restriction that no part of said premises shall in any manner be used or occupied directly or indirectly by any negro or negroes, provided that this restriction shall not prevent the occupation, during the period of their employment as janitors' or Chauffeurs' quarters in the basement or in a barn or garage in the rear, or of servants' quarters by negro janitors, employed as such for service in and about the chauffeurs or house servants, respectively, actually employed as such for service in and about the premises by the rightful owner or occupant of said premises.

2. The restriction that no part of said premises shall be sold, given, conveyed or leased to any negro or negroes, and no permission or license to use or occupy any part thereof shall be given to any negro except house servants or janitors or chauffeurs employed thereon as aforesaid.

The covenants, restrictions, and agreements herein contained shall be considered as appurtenant to and running

with the land, and shall be binding upon and for the benefit of each party hereto and may be enforced by any of the parties hereto by any permissible legal or equitable proceedings, including proceedings to enjoin violation and for specific performance; provided, however, that in any action brought to set aside any deed made in violation of any of the provisions of this agreement, it shall be a good defense thereto that prior to the institution of each suit, the title to the premises then in question had become vested in, and was then owned by a corporation or a white person, for value; and provided further, that the lien of no mortgage or trust deed in the nature of a mortgage shall be impaired or in- [fol. 106] validated by reason of the breach of any of the provisions of this agreement, whether any such breach shall have occurred prior or subsequent to the recording of any such mortgage or trust deed; and provided further, that nothing contained in the foregoing provises shall in any manner impair the right of any person or persons interested to enforce at all times and against all persons the restrictions in this agreement contained prohibiting the use or occupation of all or any part of said premises by a negro or negroes.

This agreement and the restrictions herein contained shall be of no force or effect unless this agreement or a substantially similar agreement, shall be signed by the owners above described, or their heirs or assigns, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31, 1928. Provided, however, that if the owner of any of said parcels or of any part thereof shall be under disability as, for example, when the title is held, without such power, by testamentary trustees or other fiduciaries, the frontage so owned shall be treated as though the owners thereof had power to sign and have signed this agreement, for the purpose of determining whether this agreement becomes effective or not under the provisions of this paragraph.

It is understood that for convenience, a number of counter-part or concurrent instruments have been prepared of even date herewith, the text of each of which is substantially the same as that of this instrument, and that the execution of any one of such instruments shall have the same effect as the execution of this instrument by the same person would have, and it is understood that parties to [fol. 107] this agreement shall include not only those per-

sons who shall sign this instrument but also all persons who shall sign any of said counterpart or concurrent instruments, and that this instrument and all of said counterpart or concurrent instruments shall constitute one agreement. It being contemplated that changes in ownership may occur between the date which this instrument bears and that date when it shall become effective, or that there may possibly be some misrecital of ownership herein contained, it is further understood that the execution hereof by the person who shall be the owner of any of said parcels of land at the time of such execution shall have the same effect as though such person had been the owner thereof on the date hereof and was so described herein, whether the recital of ownership herein contained be made to conform to the facts as to ownership at the time of execution, the recital in any of said instruments shall be made different from that contained in the others, that difference shall not prevent all of such instruments from being construed to be substantially similar to each other.

No restriction imposed hereby shall be abrogated or waived by any failure to enforce the provisions hereof, no matter how many violations or breaches may occur.

This agreement and the restrictions herein expressed may be abrogated at any time on or after January, 1948, by the written agreement of the owners of seventy-five per centum of the frontage owned by the parties who shall sign this agreement, as herein set forth, such abrogation to be effective from and after the date of delivery and recording of such written agreement. Provided, however, that if [fol. 108] the owner of any of said parcels or any part thereof shall be under disability, as for example, that of minority, or for any other reason shall not have the power to execute such abrogation agreement, as for example, when the title is held without such power, by testamentary trustee or other fiduciaries, the frontage so owned shall be treated as though the owners thereof had power to sign, and had signed such abrogation agreement, for the purpose of determining whether such abrogation agreement becomes effective or not under the provision of this paragraph.

The invalidity of any restriction hereby imposed, or of any provision hereof, or any part of any such restriction or provision shall not impair or effect in any manner the

validity, enforceability or affect of the rest of this agreement.

Pronouns herein employed in the masculine gender shall be construed to include the feminine and neuter genders, and the word "party" or "persons" to include natural and artificial parties or persons.

The term 'negro' as used herein shall include every person having one-eighth part or more of negro blood, or having any appreciable mixture of negro blood, and every person who is what is commonly known as a 'Colored person'.

In any case where there is a recorded lease of any parcel of the property described herein for a term ending more than five years after any given date, the owner of the reversion and the owner of the leasehold estate together shall be deemed to be the owners of such parcel on such given date within the meaning of this contract, and when-
[fol. 109] ever the signature of the owner of such parcel shall be required on such given date under the provisions, whatever interest any signer of this instrument owns in any of said property shall be bound by the provisions hereof. Leases under unrecorded leases on any given date and under leases for terms ending less than five years after such given date shall not be regarded as owners within meaning of this contract.

The undersigned spouses of owners of land herein described join herein for the purpose of signifying their assent hereto and of subjecting their rights of dower, if any, to the restrictions and provisions imposed hereby.

Time is of the essence of this contract and all the terms, conditions and provisions hereof.

The covenants, restrictions and agreements herein contained shall be binding on, and for the benefit of, and may be enforced by and against, each party hereto, his successors and assigns, and the heirs, executors, administrators and successors of them respectively.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first aforesaid."

5. That said Restrictive Agreement consisted of four (4) parts, namely: (a) Agreement with signatures of said owners thereto attached; (b) a list of properties covered by said Agreement, with legal descriptions and street num-

bers and frontages; (c) and (d) the notarial certificates of acknowledgments of the signers of said Agreement were filed for record simultaneously in the office of the Recorder of Deeds of Cook County and recorded in Book 25525 of Records as follows:

[fol. 110] (a) The Restrictive Agreement with the signatures of the signers thereof on Pages 5 to 31, both inclusive, as Document No. 9914711.

(b) The list of properties signed up, according to street number, legal description and frontage on Pages 32 to 52, both inclusive, as Document No. 9914712.

(c) The notarial certificates of acknowledgments of the signers of said Agreement on Pages 53 to 116, both inclusive, as Document No. 9914713 and on Pages 117 to 188, both inclusive, as Document No. 9914714.

6. That said Restrictive Agreement was offered and received in evidence as Plaintiffs' Exhibit 5; the notarial certificates of acknowledgments thereof as Plaintiffs' Exhibit 5A and 5B and said list of properties as Plaintiffs' Exhibit 5C.

7. The Court further finds that the defendants and each of them objected to the admissibility of said Restrictive Agreement without proof that it was signed by the requisite number of property owners comprising ninety-five per centum (95%) of the frontage thereof and the Court finds from the competent proof adduced upon this question that less than ninety-five per centum (95%) of the frontage is represented by the signatures to said Agreement; that the plaintiff offered no proof upon this subject, relying entirely upon their contention that the validity and enforceability of this Agreement had already been passed upon, adjudicated and determined by courts of competent jurisdiction and this Court finds same to be true and sustains the contention of the plaintiff and admitted in evidence said exhibits.

[fol. 111] 8. The Court further finds that by the recordation of said Restrictive Agreement as aforesaid the defendants, and each of them, had constructive notice of said Restrictive Agreement and the contents thereof.

9. The Court further finds that it is provided in said Restrictive Agreement, among other things, that the cove-

nants, restrictions and agreements therein contained shall be considered as appurtenant to and running with the land and shall be binding upon and for the benefit of and might be enforced by and against each party thereto, his successors and assigns and heirs, executors, administrators and assigns until January 1, 1948 and thereafter until abrogated by the written agreement of the owners of seventy-five per centum (75%) of the frontage owned by the parties signing said agreement.

10. The Court further finds that on, to-wit: the date of the execution of said Restrictive Agreement, and on the date of the recording thereof, one Eva Somerman was the owner of record of the following described real estate within the area covered by said Restrictive Agreement, to-wit:

Lot Twenty-seven (27) in Block Two (2) in Resubdivision of Blocks Eleven (11) and Twelve (12) in Resubdivision of the Washington Park Club Addition to Chicago, in the South half (S½) of the South East quarter (SE¼) of Section Fifteen (15), Township Thirty-eight (38) North, Range Fourteen (14), East of the Third (3rd) Principal Meridian, commonly known as 6140 Rhodes Avenue, Chicago, Cook County, Illinois.

That said real estate was then and is now improved with a three-story and basement brick apartment residence; that [fol. 112] said Eva Somerman, a white person, executed and acknowledged said agreement before the recordation thereof; that said Eva Somerman and her husband conveyed said premises to one Joseph G. Stoltz, also a white person, by quit-claim deed recorded May 31, 1933; that said Joseph G. Stoltz, by quit-claim deed recorded April 27, 1933, conveyed said premises to the First National Bank of Englewood, a corporation; that the First National Bank of Englewood conveyed said premises by deed dated May 15, 1937 to the defendant Jay B. Crook, a white person; that the deed from said Bank to Crook was recorded on May 26, 1937; that on the evening of the same day, the defendants Carl A. Hansberry and Nannie L. Hansberry, his wife, moved into the first apartment of said 6140 Rhodes Avenue, Chicago, Illinois (hereinafter for brevity sometimes referred to as the Hansberry property) and were in possession of said premises at the time of the filing of the complaint herein; that on May 27, 1937 said Jay B. Crook and

his wife conveyed said premises to defendants Carl A. Han-berry and Nannie L. Hansberry, his wife; that said Carl A. Hansberry and Nannie L. Hansberry are negroes; that the defendants William T. Mooney and Elizabeth Cotsones were white tenants occupying the second and third apartments of said 6140 Rhodes Avenue, Chicago; that up to the time the said Hansberrys moved into said premises, the same had never been occupied or owned by negroes.

11. The Court further finds that the defendant James J. Burke for a number of years prior to March 1, 1937 was the President and later the Executive Manager of the Wood-[fol. 113] lawn Property Owners' Association, the membership of which consisted of property owners interested in the enforcement of the said Restrictive Agreement; that said James J. Burke having some misunderstanding with the said Association, resigned about March 1, 1937 from said Woodlawn Property Owners' Association and severed his connection therewith, but before resigning threatened to put negroes in every block in the area covered by said Restrictive Agreement, which area was commonly known and designated as the Washington Park Subdivision.

12. The Court further finds that said Jay B. Crook was not a bona-fide purchaser of said premises at No. 6140 Rhodes Avenue, but acting in conspiracy with said James Joseph Burke by misrepresentation, deceit and fraud prevailed upon certain officers of said First National Bank of Englewood to sell said premises to said Crook and to execute said deed under their belief that the sale of said premises to him was bona-fide and that said premises would not be sold or conveyed to a negro; that said Crook was in fact then and there acting for and on behalf of the defendant Carl A. Hansberry, a negro, to acquire said premises for said Hansberry; that the said Jay B. Crook acting on behalf of said Carl A. Hansberry, applied to the said Supreme Liberty Life Insurance Company, a corporation, having its principal office in Chicago, for a loan of Forty-four Hundred Dollars ($4400.00) on said No. 6140 Rhodes Avenue property; that said loan was approved by the executive officers of said Supreme Liberty Life Insurance Company and thereupon as security for said loan a trust deed was executed by the defendants Jay B. Crook and Hallie C. [fol. 114] Crook, his wife, to the Chicago Title & Trust Company, as trustee, to secure a principal note executed by said

Jay B. Crook and his wife for Forty-four Hundred Dollars ($4400.00) payable to the order of "Bearer." All the foregoing acts by said parties were a part and parcel of the fraudulent scheme and conspiracy inaugurated by James Joseph Burke that said restricted area would be no longer free of negro inhabitants.

13. The Court further finds that the plaintiff, Anna M. Lee, and her deceased husband, High S. Lee, were at the time of the recording of said Restrictive Agreement, the owners, as joint tenants, of the two-story and basement two-apartment brick building commonly known as No. 6148 Rhodes Avenue, Chicago, Illinois; that said plaintiff Anna M. Lee and High S. Lee, her husband, signed, executed and acknowledged said Restrictive Agreement and since then have not permitted their said premises to be occupied by negroes; that since the death of said High S. Lee, the said Anna M. Lee, a widow, is now the sole owner of said No. 6148 Rhodes Avenue; that said Anna M. Lee occupies one apartment and a white tenant the other apartment; that said premises are her homestead and are located ninety (90) feet south of the Hansberry property, on the same side of the street and in the same block; that said Anna M. Lee is desirous that said Restrictive Agreement be enforced against negro occupancy or ownership.

14. That the plaintiffs, Edward I. Govanus and Esther Govanus, his wife, are now and ever since said Restrictive Agreement was recorded have been the owners of the three-story and basement three-apartment brick building and premises commonly known as No. 6142 Rhodes Avenue, [fol. 115] Chicago, Illinois, immediately south of and adjoining the Hansberry property; that said Edward L. Govanus and Esther Govanus are white persons; that they signed, executed and acknowledged said Restrictive Agreement; that they occupy the first apartment of their said premises with their family as their homestead and lease the second and third apartments to tenants; that they have never permitted their said premises to be occupied by negroes, and are desirous that said Restrictive Agreement be enforced against negro occupancy and ownership.

15. That Kathryn Luttrell, a white person, acquired title to the premises commonly known as No. 6136 Rhodes Ave-

nue, Chicago, from one Patrick T. Burke, a white person, who was one of the signers of said Restrictive Agreement; that said premises are improved with a three-story and basement three-apartment brick building and occupied exclusively by white persons; that said premises have never been occupied by negroes, that the said premises are immediately north of and adjoining the Hansberry property at No. 6140 Rhodes Avenue; that when said Hansberry took possession of his property, said Kathryn Luttrell had one vacant apartment which she had leased to a white tenant from June 1, 1937; that when said Hansberry took possession of his building and because thereof this said plaintiff's tenant refused to move into said vacant apartment and that said apartment has been vacant ever since; that said Kathryn Luttrell is desirous that said Restrictive Agreement be enforced.

16. That the plaintiff, Louise G. Anderson, a widow, and Lyman M. Anderson, her son, are white persons and are the owners of the premises commonly known as No. 6117 [fol. 116] and 6119 Eberhart Avenue, Chicago, Illinois, improved with a three-story and basement six-apartment brick building; that said premises are located in the same square block with said No. 6140 Rhodes Avenue; that said Eberhart Avenue is one block west of Rhodes Avenue, and that the rear of said Anderson premises are located about two hundred (200) feet north of the Hansberry property; and that plaintiff Louise G. Anderson and her deceased husband, as joint tenants, both signed and acknowledged said Restrictive Agreement; that their said premises have never been occupied or owned by negroes; that upon the death of said husband of the plaintiff Louise G. Anderson, said Louise G. Anderson and her son, Lyman M. Anderson, became the owners of said premises and are both desirous that said Restrictive Agreement be enforced against negro occupancy or ownership.

17. The defendant Israel Katz was at the time of the filing of the Complaint herein the owner of premises known and described as follows, to-wit:

Lot Forty-five (45) in Block One (1) in John J. Mitchell's South Park Subdivision of Blocks Nine (9), Ten (10) and Eleven (11) in Maher's Subdivision of the Southeast quarter (SE¼) of Section Fifteen (15), Township Thirty-

eight (38) North, Range Fourteen (14), East of the Third (3rd) Principal Meridian, commonly known as 6018 Vernon Avenue, Chicago, Cook County, Illinois.

That said defendant Israel Katz is a white person and was one of the signers of said Restrictive Agreement before the recordation thereof; and that said Katz's premises are within the area covered by said Restrictive Agreement.

[fol. 117] 18. That the defendant James Joseph Burke admits in his answer that in the year 1928 he purchased, through his wife, Olive Ida Burke, the premises commonly described as No. 6039 Vernon Avenue, Chicago, Illinois, and the Court finds that said James Joseph Burke was, at the time of the filing of the Complaint herein, the real beneficial owner of said premises at No. 6039 Vernon Avenue, although the record title thereto was then in the name of Olive Ida Burke; that said James Joseph Burke and Olive Ida Burke, his wife, are white persons and that their said premises are located within the area covered by said Restrictive Agreement; that said Olive Ida Burke acquired title to said No. 6039 Vernon Avenue, by mesne conveyances from one Hannah Studdert, who was one of the signers of said Restrictive Agreement.

19. The Court further finds that said defendant Harry H. Pace, at the time of the filing of the Complaint herein, was occupying and in possession of the premises commonly known as No. 413 East 60th Street, Chicago, Cook County, Illinois in violation of said Restrictive Agreement; that an action was filed in the Superior Court to dispossess said Pace from said premises on May 12, 1937, for violating said agreement but since the filing of the Complaint herein the said Harry H. Pace acquired title to said premises and is now the record owner thereof; that the legal description of said property is as follows:

Lot Seven (7) in Block One (1) in John J. Mitchell's South Park Subdivision of Blocks Nine (9), Ten (10) and Eleven (11) in Maher's Subdivision of the Southeast quarter (SE¼) of Section Fifteen (15), Township Thirty-[fol. 118] eight (38) North, Range Fourteen (14), East of the Third (3rd) Principal Meridian, in Chicago, Cook County, Illinois.

that said action is still pending; that said Harry H. Pace is a negro; that at the time of the signing of said Restrictive

Agreement and up to the 14th day of April, A. D. 1937, one Walter J. Harrower was the owner of record of said No. 413 East 60th Street; that said Walter J. Harrower is a white person and one of the signers of said Restrictive Agreement; that said premises are located within the area covered by said Restrictive Agreement; that said Harry H. Pace is a lawyer and also the President of the defendant Supreme Liberty Life Insurance Company. All the facts and circumstances surrounding the procedure and plan whereby said Pace acquired title to said premises shows a continuation of the fraudulent scheme of James Joseph Burke and his co-conspirators to prosecute his wrongful purpose and threats to bring about the destruction of said Restrictive Agreement and cause negroes to occupy the said restricted area.

20. The court further finds that the defendants in their several answers urge and contend that the Restrictive Agreement was not executed by the owners of ninety-five per centum (95%) of the frontage as is prescribed by said Agreement as a prerequisite to its enforceability and because of that fact said Agreement is null and void. To this contention or issue the plaintiff pleaded estoppel by verdict of res adjudicata contending that the execution, delivery, performance, condition precedent, validity, force and effect of this same Agreement was all adjudicated in a representative action entitled Burke vs. Kleiman, appearing in Volume [fol. 119] 277, Illinois Appellate Reports, page 519. The Court finds that the same arch-conspirator James Joseph Burke was one of the prime instigators of said suit Burke vs. Kleiman and in this cause he represents that said cause of action, namely: Burke vs. Kleiman was a friendly, collusive and fraudulent suit, purely a dummy proceeding and that therefore it should not be considered as determinative of any of the issues involved in this case. This Court finds that the said James Joseph Burke and his associated conspirators come into this court with unclean hands and cannot by reason of their misconduct avail themselves of the argument or defense that Burke vs. Kleiman does not constitute res adjudicata. This Court therefore finds from the evidence, pleadings and exhibits offered in respect of the decree in the case of Burke vs. Kleiman, aforesaid, and the affirmances thereof: that the decree in Burke vs. Kleiman, as a matter of law, is res adjudicata of the execution, re-

cordation, general validity and enforceability of the Restrictive Agreement involved herein.

21. The Court further finds that the said Restrictive Agreement was also sustained and held in full force and effect by the Superior Court of Cook County in a final decree entered on May 6, 1936 in the case entitled Howard C. Penoyer et al. vs. Sarah Cohn, General No. 34S-16816, involving the premises at No. 6049-6051 South Park Avenue, Chicago, Illinois, and in the case of George W. Cook et al. vs. Milton S. Yondorf, et al., Superior Court of Cook County, General No. 34S-1261, affecting the premises No. 6024-6030 South Park Avenue, Chicago, and a final decree entered in said cause on October 20, 1936, that said Restric-
[fol. 120] tive Agreement was in full force and effect but that same did not affect said last named premises for the reason that the title acquired by the defendant Yondorf in that cause came through foreclosure of a trust deed on said premises which was of record prior to the said Restrictive Agreement; that said last named decree has not been appealed from or reversed, but is in full force and effect.

22. The Court therefore finds that the signers of said Restrictive Agreement, their heirs, grantees, assigns and privies to said agreement are a class of persons who have common rights and who need protection against the violation of said agreement; that the plaintiffs in this case are all members of said class; that the defendants Carl A. Hansberry, Nannie L. Hansberry, Jay B. Crook, Hallie C. Crook and Harry H. Pace, are all members of this same class as privies in estate, being remote grantees of persons who signed the Restrictive Agreement; that said Restrictive Agreement is a covenant running with the land; that the defendant Israel Katz is a member of said class and personally signed said Restrictive Agreement; that the defendant James Joseph Burke is a member of the class; that the defendant Olive Ida Burke was and is a member of the said class; and brought action entitled Burke vs. Kleiman not alone on her own behalf, but on behalf of each and every member of this class as the representative of each and all of them; that the decree in said cause of Olive Ida Burke vs. Isaac Kleiman, et al., was affirmed by the Appellate Court of Illinois, First District, and that an Order of Affirmance was filed in the Superior Court and a writ of Assistance issued.

[fol. 121] 23. The Court further finds that said cause of Burke vs. Kleiman was a class action, and that the questions of the execution, delivery, performance of conditions precedent, validity, force and effect of the identical Restrictive Agreement involved in this cause were in issue, and necessarily adjudicated and in that adjudication were upheld and decreed to exist; that said facts have been properly pleaded by the plaintiffs as res adjudicata as an estoppel by verdict through the Complaint as amended and by the Reply of the plaintiffs to the answers and amended answers of the several defendants and proved by the certified copies of the Bill of Complaint, the answers, the stipulation of facts and decree in said Superior Court case of Burke vs. Kleiman, the Order of Affirmance thereof by the Appellate Court introduced in this cause.

24. The Court further finds that said defendant Israel Katz made threats to sell, lease or convey his property to negroes; that said Israel Katz is one of the signers of said Restrictive Agreement and is bound thereby and it is therefore ordered that the temporary injunction heretofore entered against said Israel Katz be and the same is made permanent.

25. The Court further finds that said Restrictive Agreement is not against public policy, is not violative of any Article of the Constitution of the United States or of the State of Illinois, is not unconstitutional, is not against the public welfare, or in restraint of trade, or in restraint of alienation, does not deprive the defendants of any of their civil rights guaranteed said defendants *of any of their civil rights guaranteed said defendants* or negroes as a class by [fol. 122] the due process clauses of the Federal or State Constitutions, and it is therefore ordered that the objections of the plaintiffs to the amended answers of the several defendants in respect to the defenses described in this paragraph be and the same are now sustained.

26. The Court further finds that said Restrictive Agreement was at the time of the filing of the Complaint herein and is now in full force and effect and binding on the defendants Carl A. Hansberry, Nannie L. Hansberry, his wife, Jay B. Crook, Hallie C. Crook, his wife, James Joseph Burke, Harry H. Pace, Supreme Liberty Life Insurance Company and Israel Katz and each and all of them; that

the said agreement is a covenant running with the land, and that said plaintiffs are entitled to enforce said Restrictive Agreement; that the possession and ownership of said No. 6140 Rhodes Avenue, Chicago, Illinois, by the defendants Carl A. Hansberry and Nannie L. Hansberry, is a violation of said Restrictive Agreement; that said plaintiffs have not an adequate, full and complete remedy at law and that the plaintiffs will suffer irreparable injury to their respective properties unless said Restrictive Agreement be enforced including the enforcement thereof by the lawful processes of this Court.

27. The Court further finds that said plaintiffs are not and have not been guilty of laches or negligence; that the signers of said Restrictive Agreement have been diligent in enforcing said agreement and that the violation of said agreement by the defendants Carl A. Hansberry and Nannie L. Hansberry particularly affects the property rights of the respective plaintiffs and each of them, for the rea- [fol. 123] son that said violation is proximate to the premises of the plaintiffs.

28. It is, therefore, ordered, adjudged and decreed that the temporary injunction issued by this Court on July 8, 1937 be and the same is declared permanent against each and every one of said defendants, Carl A. Hansberry, Nannie L. Hansberry, Jay B. Crook, Hallie C. Crook, James Joseph Burke, Harry H. Pace, Supreme Liberty Life Insurance Company, Israel Katz and each of them and against the agents, servants, attorneys and solicitors of said defendants.

29. And it is further ordered, adjudged and decreed by this Court that said defendants, Carl A. Hansberry and Nannie L. Hansberry, convey all their right, title and interest in the said premises and described as:

Lot Twenty-seven (27) in Block Two (2) in Resubdivision of Blocks Eleven (11) and Twelve (12) in Resubdivision of the Washington Park Club Addition to Chicago, in the South half (S½) of the Southeast quarter (SE¼) of Section Fifteen (15), Township thirty-eight (38) North, Range Fourteen (14), East of the Third (3rd) Principal Meridian, commonly known as 6140 Rhodes Avenue, Chicago, Cook County, Illinois.

within thirty (30) days to a person who is not a negro, within the terms of, and subject to said Restrictive Agreement, and on failure so to do that Isadore Brown, one of the Masters in Chancery of this Court, convey all the right, title and interest of said Carl A. Hansberry and Nannie L. Hansberry, his wife, by a good and sufficient deed, subject to said Restrictive Agreement, to the defendant, Jay B. Crook, to [fol. 124] whom the same was conveyed in good faith by said First National Bank of Englewood; and that the said Jay B. Crook, Hallie C. Crook, his wife, said Carl A. Hansberry and Nannie L. Hansberry, his wife, and the grantee or grantees of any or either of them, their heirs, successors, administrators, executors, or assigns, and each of them, their agents, or attorneys, be and they are hereby permanently enjoined until January 1, 1948, and thereafter until said Restrictive Agreement shall be abrogated according to its terms, from selling, conveying, leasing or renting said premises at No. 6140 Rhodes Avenue, Chicago, or any part thereof to a negro or negroes, or permitting a negro or negroes to occupy said premises or any part thereof except such negro house-servants, janitors, or chauffeurs actually employed as such for service in and about said premises by the rightful owner or occupancy of said premises; that said injunction issue without bond and that the bond filed by the plaintiffs for the issuance of the temporary injunction be cancelled, and of no further effect, and that upon the conveyance of said premises at No. 6140 Rhodes Avenue, Chicago, Illinois, to said Jay B. Crook, or some other person who is not a negro that the rents deposited with the Clerk of this Court or due from tenants since the temporary injunction was entered herein, and future rents be turned over to said Jay B. Crook, or to the person who is not a negro to whom said premises may be conveyed by said Carl A. Hansberry and Nannie L. Hansberry, his wife, and that the defendants pay the costs of this suit and that execution issue therefor as at common law.

It is further ordered that the original exhibits introduced [fol. 125] in evidence may be withdrawn by the respective parties and photostatic or typewritten copies thereof filed in lieu thereof.

Enter: George W. Bristow, Judge.

PETITION TO VACATE DECREE

Petition of defendants to vacate and set aside decree heretofore entered on August 19, 1938, and affidavit filed therewith hereinafter abstracted (p. 283.)

Notice of Appeal of the defendants Carl A. Hansberry, Nannie L. Hansberry, Harry H. Pace, James Joseph Burke and Israel Katz, from the decree entered August 19, 1938. Proof of Service of Notice of Appeal upon Charles A. Churan, Schuyler & Hennessy and Angus Roy Shannon, Attorneys for Plaintiffs-Appellees, and on Arthur A. Basse, Attorney for Jay B. Crook, Hallie C. Crook, defendants and co-parties, and on W. T. Mooney and Elizabeth Cotsones, defendants and co-parties.

Notice of Filing Notice of Appeal.

Praecipe for Record.

Time for signing, approving and filing report of proceedings extended by order of Court.

Stipulation extending time for filing, approving and signing Report of Proceedings.

Notice of Report of Proceedings to be Filed.

Stipulation to use original Report of Proceedings.

Order approving the Report of Proceedings.

Order allowing copy of Original Report of Proceedings to be incorporated.

Certification by Clerk of Circuit Court that the full, complete and perfect transcript of the Report and Proceedings [fol. 126] are included in Volumes I, II and III.

NOTICE OF APPEAL—Filed November 15, 1938

I

Please Take Notice, that the defendants, Carl A. Hansberry, Nannie L. Hansberry, Jay B. Crook, Hallie C. Crook, James Joseph Burke, Harry H. Pace, Supreme Liberty Life Insurance Co., a Corp., W. T. Mooney, and Elizabeth Cotsones, hereby appeal to the Supreme Court of Illinois from the decree rendered and entered in the above entitled cause in the Circuit Court of Cook County, Illinois, on the 19th day of August, A. D. 1938, including any and all orders and findings therein, hereby and herein, among other things, the Temporary Injunction issued by the Circuit Court of

Cook County on July 8, 1937, against said defendants was made permanent and wherein it is ordered that the defendants, Carl A. Hansberry and Nannie L. Hansberry, convey the premises commonly known as 6140 Rhodes Avenue, Chicago, Illinois, and more particularly described in the Complaint as Amended, within thirty (30) days to a person who is not a Negro within the terms and subject to the Restrictive Agreement sought to be enforced in said cause, and on failure to so do Isadore Brown, one of the Masters in Chancery in said Court, convey all the right, title and interest of said Carl A. Hansberry and Nannie L. Hansberry, his wife, by a good and sufficient deed, subject to said Restrictive Agreement, to the defendant, Jay B. Crook; [fol. 127] and enjoining Jay B. Crook, Hallie C. Crook, his wife, and Carl A. Hansberry and Nannie L. Hansberry, his wife, and the grantee or grantees or any of them, their agents or attorneys, until January 1, 1948, and thereafter until said Restrictive Agreement shall be abrogated according to its terms, from selling, conveying, leasing or renting said premises at 6140 Rhodes Avenue, Chicago, Illinois, or any part thereof, to a Negro or Negroes, or permitting a Negro or Negroes to occupy said premises or any part thereof, except as such Negro house-servants, janitors, or chauffeurs actually employed as such for service in and about said premises by the rightful owner or occupant of said premises; and further ordering that said injunction issue without bond and that the bond filed by the plaintiffs for the issuance of said injunction be cancelled, and of no further effect, and that upon the conveyance of said premises at 6140 Rhodes Avenue, Chicago, Illinois, to said Jay B. Crook, or some other person who is not a Negro that the rents deposited with the Clerk of this Court or due from tenants since the temporary Injunction was entered herein on the 8th of July, 1937, and future rents be turned over to said Jay B. Crook, or to a person who is not a Negro, to whom said premises may be conveyed by said Carl A. Hansberry and Nannie L. Hansberry, his wife, and further ordering that the defendants pay the cost of this suit and that execution issue therefor as at common law.

Said defendants hereby further appeal from the order entered in the above entitled cause on the 29th of September, [fol. 128] 1938, denying and overruling the motion to vacate and set aside the decree rendered and entered on the above entitled cause on the 19th day of August, 1938, as aforesaid.

II

Defendants pray, and each of them prays, that the said decree of the Circuit Court be reversed and the Complaint in Chancery be dismissed for want of equity and that the injunction entered in said cause be dissolved and that the defendants, Carl A. Hansberry and Nannie L. Hansberry, his wife, be reinvested with the title to the premises known as 6140 Rhodes Avenue, Chicago, Illinois, and more specifically described in the Complaint as amended, and that the rents, issues and profits arising from premises since the issue of the temporary injunction on the 8th day of July, 1937, be delivered forthwith to the defendants, Carl A. Hansberry and Nannie L. Hansberry, his wife.

Carl A. Hansberry, Nannie L. Hansberry, Jay B. Crook, Hallie C. Crook, James Joseph Burke, Harry H. Pace, Supreme Liberty Life Insurance Co., a Corp., Israel Katz, Defendants-Appellants.
Earl B. Dickerson, Loring B. Moore, C. Francis Stradford, Truman K. Gibson, Irvin C. Mollison, Attorneys for Defendants-Appellants, by Earl B. Dickerson.

[fol. 129] **Report of Testimony of Witnesses and Proceedings, Had Before the Honorable George W. Bristow, One of the Judges Sitting in the Circuit Court of Cook County, Beginning on March 25, and Continuing on Divers Days Thereafter Until Completed**

Present:

Mr. Charles A. Churan, Mr. Angus Roy Shannon, and Schuyler and Hennessy by W. W. Graves, Esq., and Mr. H. E. Raymond, representing the plaintiffs;

Messrs. Earl B. Dickerson, and Truman K. Gibson, representing the defendants Harry H. Pace and Supreme Liberty Life Insurance Company, a corporation;

Mr. C. Francis Stradford, representing the defendants Carl A. Hansberry and Nannie L. Hansberry;

Mr. Loring B. Moore, representing the defendant James Joseph Burke;

Mr. Irvin C. Mollison, representing the defendant Israel Katz;

Mr. Arthur Basse, representing the defendants Jay B. Crook and Hallie C. Crook.

Thereupon the plaintiffs to maintain the issues on their part introduced the following evidence, to-wit:

EVA SOMERMAN:

Direct examination.

By Mr. Churan:

My name is Eva Somerman. I live at 8216 Indiana Avenue. My husband's name is Sam Somerman. I lived at 6140 Rhodes Avenue, having bought that property in 1919 from Paul Greenhut. I moved in 1937, in May, about the 18th. I sold it in 1933 to the First National Bank of Englewood. I gave them the deed. I made the deed to Stoltz. [fol. 130] That is my signature and this is my husband's signature on the certified copy of the deed from Eva Somerman and Sam Somerman to Joseph D. Stoltz. That is my signature and my husband's signature on Plaintiff's Exhibit 5 for identification. Since I signed that restrictive agreement, the property was never occupied by colored people. This was a three-flat building and basement, three sixes. My neighbors were Govanus and Mr. Burke. It was completely occupied with buildings on both sides of the streets, but was never occupied or owned by colored people during the time I lived there.

Cross-examination.

By Mr. Stradford:

It is so long since I signed this document, I don't remember who were present at the time. Someone brought it to my home. The Woodlawn Association brought it. My husband and I were both present. I don't remember what was said at the time this instrument was presented to me, it is so long ago. I don't know who presented it to me. He knows me, maybe. I know he belongs to the Woodlawn Association. I don't know what an acknowledgment is. I didn't go through any formality of signing it or acknowledging it. I didn't take any oath in respect to it.

Redirect examination.

By Mr. Churan:

I don't know what is meant by the word "acknowledgment".

[fol. 131] ESTHER D. GOVANUS:

Direct examination.

By Mr. Churan:

My full name is Esther D. Govanus. I live at 6142 Rhodes Avenue, Chicago, Illinois. I own that property. My husband's name is Edward Leonard Govanus. My husband and I own the property next to the property that Mrs. Somerman testified about. I am south from 6140. I acquired this property September 5, 1924. I have lived there ever since. We have a three-flat, with six rooms and a sun parlor and an English basement. It is a brick building. It is occupied by white people. It has never been occupied by colored. There were no colored people in that neighborhood until the Hansberrys moved in there May 26th. The Hansberrys are colored. There are no colored people on Rhodes Avenue from 62nd to 63rd. There have been no colored in there since February 1, 1928. The block on Rhodes Avenue between 60th and 61st is occupied by white people. My husband's signature and my signature are on page 14 of Plaintiff's Exhibit 5 for identification. The property on Rhodes Avenue is residential property, except on the corner of 61st Street and Rhodes is a grocery store.

Cross-examination.

By Mr. Stradford:

I don't remember where I was at the time I affixed my signature to this document. My husband was present at the time I signed Exhibit 5 for identification. I don't remember if anyone else was present, don't remember anything that was said. I don't think I did anything other than sign my signature at the time.

[fol. 132] Redirect examination.

By Mr. Churan:

I don't remember who presented this document for my signature. I think I am one of the plaintiffs in this case. My husband is a plaintiff also.

(Witness excused.)

LOUISE GASKILL ANDERSON:

Direct examination.

By Mr. Churan:

My full name is Louise Gaskill Anderson. I live at 6117 Eberhart Avenue, Chicago, Illinois. I am a widow. I have lived at 6117-19 Eberhart Avenue for twenty-five years. My signature is on page 17 of Plaintiff's Exhibit 5 for identification, Parcel Number 273. I presume Mr. Hellman asked me to sign it but I wouldn't swear to it. I have a six-apartment, five rooms in each apartment, a brick building. I am one of the plaintiffs.

Eberhart is one block west of Rhodes Avenue. The rear of my property abuts on the same alley as the rear of the property at 6140 Rhodes Avenue. From 60th to 63rd Street is exclusively residences ranging from two flats to twelve. My building has not been occupied by colored people since February 1, 1928. It is all rented now. The buildings in the block from 61st to 62nd have never been occupied or owned by colored people, nor has the block from 60th to 61st. I lived at 23 East 34th Place before I bought the property where I now live. I moved from there in 1913. I am a member of the Woodlawn Property Owners' League, formerly called Woodlawn Property Owners' Association. My subdivision is often called the Washington Park Subdivi-
[fol. 133] sion. It was organized prior to the date of signing this agreement, February 1, 1928, and I have been a member of the Woodlawn Property Owners' Association ever since. We met once a month. I know Mr. James Joseph Burke personally. I don't recall when he took charge of the Association or became president. The meetings were usually held in Ludlow's Undertaking Rooms on Cottage Grove Avenue

just around the corner from 61st Street. The room was always filled. Our president, James Joseph Burke presided at these meetings. He was very active at all times. We tried to keep our property for our own race, and at these meetings that discussion took place frequently, how we could best do that. Mr. Burke was connected with the Woodlawn Property Owners' Association until about two years ago. Now that I come to think of it, it was February, 1937.

Mr. Burke was at that meeting. He severed his connection with the Woodlawn Property Owners' Association immediately after that. He called upon me at my home very shortly after that, in the latter part of February, 1937, and said he wished to explain to me why he was doing some of the things he did. He became very angry, and he felt that he had not been treated justly, and he said he was going to have revenge upon the people who had been so very unfair to him. He said, "I will plant colored people in every block in this region to show the people what I can do." He meant the restrictive area. He was very angry, and so I said very little. I do remember saying, "Well, Mr. Burke, you couldn't do a thing like that."

[fol. 134] I do not recall the date when I signed this document. I think I was in my home when I signed it. I think Mr. Hellman and Mr. Davidson were there at the time. I do not recall how many pages were there. I do not recall whether this document is in the condition it was at the time I signed it.

Cross-examination.

By Mr. Dickerson:

I know that the document was acknowledged. I know that it was stamped by the notary after it was signed. I think the notary's name was Davidson, something like that. He must have been present, I think he was. I will say yes, sir. I am quite positive both Mr. Hellman and Mr. Davidson were there with the document. I knew Mr. Hellman for many years. He was secretary of the Association. Mr. Davidson was a lawyer for the Association at the time, but I couldn't swear whether or not he was a member.

Redirect examination.

By Mr. Churan:

I believe Mr. Hellman's full name is Fred or Frederick.

(Witness excused.)

ANNA M. LEE:

Direct examination.

By Mr. Churan:

My full name is Anna Marie Lee. I live at 6148 Rhodes Avenue, Chicago, Illinois. I am one of the plaintiffs in this case. My property is three doors south from 6140. I have [fol. 135] lived at 6148 Rhodes Avenue around twenty-one years. My husband and I owned the property in joint tenancy. My signature and my husband's signature is on page 14 of Plaintiff's Exhibit 5 for identification. My property is a two-flat brick building, six and five rooms. It is residential property. I couldn't say for sure when I signed this agreement. My property has never been occupied by colored people since I signed the "agreement". None of the property in my block had ever been occupied by colored people until May 26, 1937, when a family by the name of Hansberry moved in at 6140 Rhodes Avenue, 1st apartment. They are colored.

Cross-examination.

By Mr. Stradford:

My husband and I were present at the time I signed the document and a notary. I don't know what his name was. I don't know him personally, had never had any dealings with him, had never seen him before. I couldn't say whether it was in a single sheet or in a folder when Plaintiff's Exhibit 5 for identification was submitted to me. I suppose the document is a little older than it was at the time it was presented to me. We simply sat down and signed our names.

Redirect examination.

By Mr. Churan:

I am a member of the Woodlawn Property Owners' Association. Have been a member since the organization started, ever since I signed that instrument. I know James Joseph Burke. He was at our house collecting dues many times. I have known him ever since I belonged to the organization. I don't know when he took charge of the As-
[fol. 136] sociation. I don't know who took charge of the meetings after Mr. Burke because I didn't attend very many. I paid my dues which were $6.00 a year.

(Witness excused.)

ALBERT H. OLSEN:

Direct examination.

By Mr. Churan:

My full name is Albert H. Olsen. I live at 9153 South Ada. I am Cashier of the First National Bank of Englewood. I have been connected with the bank twenty-eight years. I know Joseph D. Stultz. He is vault manager of the Safety Deposit Company. I managed the renting and sale of the property at 6140 Rhodes Avenue. I have known Mr. James Joseph Burke about a year, I guess. I met him while I was manager of the real estate department. He was connected with the Woodlawn Property Owners' Association. The property at 6140 Rhodes is in the Washington Park Subdivision. In May of 1937 Mr. Burke called at my office and asked if we had any properties for sale in the Washington Park Subdivision. I told him we had one piece at that time, 6140 Rhodes Avenue. About a week later he called back and said he had a buyer for the property. I don't remember the exact date when I had the first meeting with Burke about this property. We had a general conversation about his work with the Property Owners' Association. He said he was no longer with it. Our next meeting was about the 19th of May, 1937. He called at the office and introduced me to a gentleman by the name of Mr. Crook, Jay B. Crook, and he stated that he was the party buying the property. Jay B. Crook

[fol. 137] is a white man. I had never seen him before. Mr. Burke stated that Mr. Crook wanted to take possession of the property prior to the closing of the deal, and I told him that we would not surrender possession until we had our money. Then he asked if we would rent him the property, lease it to him for a year on the payment of one month's rent. That was in the presence of Mr. Jay B. Crook. Mr. Crook gave me $35.00, and I gave him a receipt for one month's rent, and drew up a lease for the 1st apartment of the building. Selz & Southman had been our renting agents for that apartment up to that time. They are located at 6100 South Park Avenue. We had already settled the price of the property about a week before that. Mr. Burke called on the telephone and stated that he had a buyer for the price we asked, which was $6,500.00, and that he would bring him over before noon of that day. I had to leave before noon, and I went by and told the president of the bank Mr. Burke had a buyer for the property. He said, "Did you ask him, did you tell him?" After my conversation with the president, I called Mr. Burke on the telephone, and he was not at home. I left a message with a party who stated she was his wife that we would require a clause in the contract, the sales contract regarding a restriction of the property against colored. I never heard from Burke after that. The property was sold to Jay B. Crook by the First National Bank of Englewood. Anderson & Anderson represented us, and it was closed at the Chicago Title and Trust Company. There was never a contract drawn up. Mr. George Anderson of Anderson & Anderson drew up the papers and sent them to the bank. [fol. 138] We signed them and returned them to him, and the deed was deposited with the Chicago Title and Trust Company in escrow. I don't remember the escrow number. The deed and escrow, prepared by Mr. George Anderson, was sent to us and we mailed it back to Mr. Anderson. I have not seen the deed since. Plaintiff's Exhibit 9 is a photostatic copy of the deed from the bank to Jay B. Crook. On the morning of May 27, I believe, I received a telephone call from our agent, Selz & Southman, stating that colored had moved into the property. I called Mr. Anderson and requested that he hold up the delivery, or have the Chicago Title and Trust Company hold up delivery of the deed. I was not present when the deed was drawn down from escrow. I did not know at that time that that prop-

erty was to be occupied by colored people. On the morning of May 27th was the first I knew of it. I had no intention of selling it to colored. When we learned it was occupied by colored we tried to stop the delivery of the deed, but it was too late. It had already been delivered.

(Witness excused.)

EDWIN D. JOHNSON:

Direct examination.

By Mr. Churan:

My full name is Edwin D. Johnson. I am in the real estate business under the name of Johnson Realty Company. My place of business is located at 11109 Longwood Drive, Chicago, Illinois. I have been in the real estate business a matter of twelve or fourteen years. The prop- [fol. 139] erty at 413 East 60th Street up to last May was owned by Walter J. Harrower. We had the handling of 413 East 60th Street for sale or for rent for a time and finally only for sale. It is located between Vernon Avenue and South Park Avenue. Washington Park is across the street from this property. It is a residence, consisting of a two-story brick with Indiana limestone front, seven rooms. I sold the property for my cousin, W. J. Harrower. This is Mr. Harrower's signature on Plaintiff's Exhibit 5 for identification on page 24. He was the owner of parcel number 472. May F. Harrower's signature is also on there. She was his former wife. She died. Mr. James J. Burke came to see us and said he had a customer that would buy the property. I had known him before. I think it was in March, 1937, Mr. Burke told me that he had a party that would buy the property, and I told him it would have to be white, because we couldn't sell to colored; and he understood that. And I told Mr. Harrower. He said, "This is a white man that wants to buy it." I don't think he gave me his name at that time. I knew he was connected with the Woodlawn Property Owners' Association. I think I attended two meetings of the Property Owners' Association in connection with that property that I was offering for sale. I knew that that property was restricted against colored. Mr. Harrower had a standing offer for

years at very much more money that we finally sold it for, if he would sell to colored, but he couldn't sell to colored, because he had signed this agreement. The contract was signed up between Mr. Harrower and Mr. Burke and the purchaser, Henry A. Lutz. This is the contract. Mr. [fol. 140] Harrower was in Florida when he signed this contract. The purchase price was $3,000.00. The legal description of 413 East 60th Street is Lot 7 in Block 1 in John A. Mitchell's South Park Subdivision of Blocks 9, 10 and 11 in Maher's Subdivision of the Southeast Quarter of Section 15, Township 48 North, Range 14, East of the Third Principal Meridian, Cook County, Illinois. The contract was executed on March 5, 1937. I did not see Lutz sign it. Mr. Burke handled it, and he brought Mr. Lutz' signature and also a deposit. I mean Mr. James Joseph Burke, the man that was connected with the Woodlawn Property Owners' Association. His signature appears on the contract as a witness to Mr. Lutz' signature. The deal was closed in our office by certified check by Mr. Lutz for the remainder due after the deposit. I forget the exact amount of deposit. I instructed him to make the check payable to the order of Mr. Harrower. Mr. Burke brought the check to Johnson Realty Company. We gave him the deed when he brought in the certified check. I don't know who is occupying the property now. I don't know who Parrish was that the property was conveyed to. I never met him. I had no knowledge that this property was to be sold to colored people. We would have refused to deliver the deed if we had known.

Cross-examination.

By Mr. Dickerson:

When I say, "We should have refused to sell it, I mean that Mr. Harrower had instructed me that he had signed this agreement, and therefore we must not sell to colored under any circumstances, and of course we were forbidden —We had plenty of opportunity. We had no end of ap- [fol. 141] plicants, colored people to buy the property, and in every case we told them we couldn't sell to colored people. I had control of the property for more than a year. It was vacant while I had control of it, except that part of the time it was occupied by Mr. Harrower's maid. His

maid was in possession of the property for about a year before I took it. It was for sale about two years.

Redirect examination.

By Mr. Churan:

There was an abstract delivered to Mr. Burke at the time the deed was delivered, an abstract to the property at 413 East 60th Street, Chicago.

(Witness excused.)

WILLIAM J. O'BRIEN:

Direct examination.

By Mr. Churan:

My full name is William J. O'Brien. I live at 1132 East 45th Street. I am in the real estate business, connected with the firm of Schackmuth, Strasser & O'Brien. I know the property at 549 East 60th Street. My firm had charge of that property in September and October, 1936. We acted as agents only for R. M. O'Brien, the receiver. We rented the first apartment to Ruth Hoffman. We took the customary application. I believe she is a white woman. There was a lease made that was signed by Hansberry—or, was signed by Ruth Hoffman, but was never signed by R. M. O'Brien. It was signed by us as agents. I haven't seen the lease since. I believe Mr. Bonnefoi has the lease. He is attorney for the receiver. He was the attorney in [fol. 142] the foreclosure proceeding affecting 549 East 60th Street. Ruth Hoffman made the customary rent application, said she was coming here from Philadelphia or Washington, and we accepted her application. I believe she paid two months rent at the time. I think Hansberry moved in, I don't know that Ruth Hoffman did. It is my best judgment Hansberry took possession of the property. That is Carl A. Hansberry. He continued to live there until the following May, I believe. I did not know that Hansberry was going to occupy that apartment when I rented it to Ruth Hoffman. She did not tell me that her family was colored, nor that she would put a colored tenant in there, or sub-tenant. I think on Saturday, the following

day after she signed the lease, colored people moved in. I would not have leased that apartment to her if I had known she was going to put colored people in there. The property is located between St. Lawrence and Champlain. Washington Park is across the street from that property and extends from 60th Street north to 51st Street. It is residential property in the Washington Park Subdivision. I believe Delaunty was the owner of the property against whom the foreclosure was commenced.

Cross-examination.

By Mr. Stradford:

I took the application of Ruth Hoffman. I believed her to be white. I did not ask her. I think she got the key from the janitor, who lives near the premises. She went into the flat. I don't know how long she remained there. I don't know what relationship Hansberry had with Ruth Hoffman.

Cross-examination.

By Mr. Dickerson:

[fol. 143] Nothing was said in my conversation with Miss Hoffman about colored people occupying the premises.

Cross-examination (Continued).

By Mr. Stradford:

It is only hearsay on my part that the Hansberrys, or Ruth Hoffman, were ejected by a writ of assistance. I know that the Court cancelled the lease on the ground that the receiver didn't have the authority to enter into a lease extending beyond the period of redemption.

(Witness excused.)

HARRY D. LUDLOW:

Direct examination.

By Mr. Churan:

My full name is Harry D. Ludlow. I live at 6110 Cottage Grove. I have owned the property there which is in

Washington Park Subdivision for nine years this next month. I owned that property before I moved there. I bought my present property April 1, 1929. I was vice-president of the Woodlawn Property Owners' Association in 1933, I believe, for—well, 1934. In 1935 I was president, and I was vice-president every year since. I am vice-president now. Mr. J. J. Burke was president in 1933 and 1934. He was connected with the Woodlawn Property Owners' Association from 1933 to 1935, I believe. After I became president he was sort of business agent, executive manager. The next year we made a change of officers and he became dissatisfied evidently with the way things went in the Asso- [fol. 144] ciation, and withdrew. I believe that was in 1936. Last year he stepped out entirely, I guess that is true, too. I guess it was 1937. I heard Mr. Burke resign at a meeting of the Woodlawn Property Owners' Association. I think Mr. Hyde, the president was presiding at that meeting, I can't remember whether I was presiding or not. I was presiding as president before Mr. Hyde was elected president. I heard Mr. Burke say that he would resign the 1st of March. I asked him why he should want to resign, and so forth. The Woodlawn Property Owners' Association held their meetings at my chapel every month. The seating capacity of my chapel is about 150. We wanted to keep that white as much as we could. It is a half mile from South Park Avenue to Cottage Grove Avenue and a quarter of a mile from 60th Street to 63rd Street. That is the Washington Park Subdivision. Mr. James Joseph Burke was very active in the organization. He was interested in the restrictive agreement, and in keeping the subdivision white. After Mr. Burke resigned, in March, 1937, I had a conversation with him in my office once or twice, and he seemed disgruntled. Said if he couldn't go ahead and be the whole thing, as he was—and have charge of that portion of it—he didn't want to be under dictation apparently,—that if he couldn't do it, he would resign, that is why he was resigning, because he couldn't. He made threats he could do this and do that, as though he could hurt our Association a great deal, and I rebuked him for that. Said he could go to work and sell property to colored there in that district, which I considered a detriment to our Association. I said, "What would our people think?" I have been over this [fol. 145] territory from South Park to Cottage Grove Avenue every day or so. South Park is the west boundary line

of Woodlawn, Washington Park. Cottage Grove Avenue is the sort of boundary between the old Woodlawn. Cottage Grove is east from Woodlawn. Rhodes is the fifth block west. I did not have any conversation with Burke over the telephone after Hansberry moved into the property on Rhodes Avenue.

Cross-examination.

By Mr. Stradford:

I believe the Woodlawn Property Owners' Association is a corporation. We have a charter for it, and all. I am vice-president of that organization at the present time. I do not have the charter with me. Mr. Burke was on a salary and was paid up until the time when he left the Woodlawn Property Owners' Association. We were a little behind there at the time, I believe, but we finally satisfied him all right. At one time we were seven or eight hundred dollars behind in his salary. I never heard him say he could dispose of some of that property to colored, because the agreement upon which we had been proceeding had not been properly signed. It wasn't on account of the 95 per cent, he figured there was enough unsigned property that would make him a pretty good business, or something like that, that he could dispose of these unsigned properties, that is what I understood. I couldn't say what per cent that unsigned property represented. He didn't tell me that the Woodlawn Property Owners' Association could not prove the required frontage in Cook vs. Yondorf. My primary interest was a business one when I moved from 47th Street to 61st. I bought out there with the understanding [fol. 146] it was a nice neighborhood, and I thought people would come there, and I didn't want it to change the same as it had from where I had moved. I lived at 4744 Forrestville. The Woodlawn Property Owners' Association owed Mr. Burke a few hundred dollars in March, 1937, but I didn't have the books at that time, and I couldn't say, I know we owed him something.

(Witness excused.)

HENRY ALOYSIUS LUTZ:

Direct examination.

By Mr. Churan:

My full name is Henry Aloysius Lutz. I live at 1950 Fletcher Street, Chicago, Illinois. I am with B. Kuppenheimer & Company, wholesale clothiers. That is my signature on Plaintiff's Exhibit 14, a contract between Walter J. Harrower and myself for the purchase by me of property at 413 East 60th Street. A man by the name of Bibb, I understand he is in the law business, asked me if I would make the purchase for him for some relative of his in New York, a Mr. Parrish, I don't recall his first name. I was to get paid for my work on it. If I remember correctly, I was to get five per cent commission. I have a broker's license. I never saw the property at 413 East 60th Street. I had the money, I don't recall whether Mr. Bibb brought in the money at the time, or whether I furnished it, but I had the money to furnish in cash. The first payment, if I remember correctly, was $500.00. That was the first payment on it to bind the contract. I had the cash there of my own money. I always have plenty on hand. Mr. Bibb came in with Mr. Burke and I got in touch with somebody [fol. 147] from the Johnson Realty. Mr. Burke had some credentials to show that he was from there. He told me that this property was for sale. The deal was closed at my place, Kuppenheimer's. They came in there with all the papers, and we signed all the papers making the transfer right there, the money and all. As I recall it, Mr. Johnson wasn't there. The conveyance from myself to Parrish and the other one was effected. The deed to myself was in my office just long enough to sign it. This is my signature on the photostatic copy of the quit-claim deed from myself to Edward E. Parrish. I did not see Edward E. Parrish, the man I sold to. I have never met him. Mr. Bibb told me that Parrish was some relative of his. I got five per cent broker's commission. There was no consideration given to me for my deed. The deed was made up in my office up on the North Side, and I brought it down with me, and it was picked up at Kuppenheimer's. Mr. Bibb came in at that time. If I recall correctly, they had the deed from Harrower to myself with them. I turned all this over at one time, signed all these

papers. Mr. Burke brought Plaintiffs' Exhibit 14 in, which is the original contract for the purchase by me of this property. If I recall correctly, I turned Plaintiffs' Exhibit 14, the deed from Walter J. Harrower to myself, over to Mr. Bibb. Mr. Bibb is a white man as far as I could see. I know Mr. Pace. I don't recall right now having made a mortgage on this property to the Supreme Liberty Life Insurance Company. The money for the purchase of that property from Harrower came from Mr. Bibb, as far as I know. Bibb, I guess, was the one who had the cash, and he turned it over to me and I turned it over to Mr. [fol. 148] Burke. As I recall, it was not necessary for me to put any of my own money into it, although I was prepared to do so.

(Witness excused.)

MARY A. BURKE:

Direct examination.

By Mr. Churan:

My full name is Mary A. Burke. I live at 6136 Rhodes Avenue. I am familiar with the property next door to the Hansberry property, at 6140 Rhodes Avenue. I live to the left of them, in the first apartment. That is to the north of 6140. My father built our place. My number is 6136 Rhodes Avenue. It is a 3-flat building. Selz and Southman were managing that property last May, I am familiar with my father's signature, and this is his signature here on page 14 of Plaintiffs' Exhibit 5 for Identification. 263 is the parcel number of Mr. Burke's property. I have lived there ever since the property was built. There was some transaction, but I am not very familiar with it. I know there was a Katherine Lutrell. I know the property next door was owned by the Somermans at one time. Carl A. Hansberry moved into that property last May 26th. The third apartment in my building was and still is vacant. Selz & Southman sent several people to look at the apartment. There was one particular party, I don't know whether the office sent them or whether they just saw the sign on the door.

Cross-examination.

By Mr. Stradford:

[fol. 149] I couldn't answer as to whether the real estate office that handled that property had a tenant to sign a lease. They sent different prospective tenants over.

(Witness excused.)

GEORGE F. ANDERSON:

Direct examination.

By Mr. Churan:

My name is George F. Anderson. I am a lawyer, admitted to practice law in the State of Illinois, have been in active practice in Chicago, Cook County for thirty-two years. Am a member of the firm of Anderson & Anderson. My office is in the Chicago Title & Trust Building, and I reside at 6140 Langley Avenue, Chicago, Illinois. That is in the Washington Park Subdivision. I have lived there almost twenty years. I am the attorney for the First National Bank of Englewood, the firm, rather, Anderson & Anderson. I was engaged last April in looking after the interest of the First National Bank of Englewood in an escrow at the Chicago Title & Trust Company in reference to property at 6140 Rhodes Avenue. Mr. Olsen, an officer of the bank called me up on the telephone. I called up the lawyer who was supposed to represent the buyer, and told him we were representing the bank, and I was ready to close the deal at any time that it was convenient to him. I think his name is Arthur A. Basse, 1408 Marquette Building. I suggested to him that we meet and set the deal up in escrow, and he told me that an escrow had already been created and he gave me the number of it. The number is 106146. [fol. 150] The Escrow Department of the Chicago Title & Trust Company is in the same building as I am. I did not go to see the agreement, I sent someone down to examine it. I got a copy of it, and I called Mr. Basse up and told him that the escrow agreement provided that the deed should be deposited and recorded and about a month later the purchase money was to be put up; I told him I could not agree to the recording of any deed until the purchase money

was paid. No money had been put up at that time. The escrow agreement was amended and the new escrow agreement was signed. The legal description of that property is Lot 27 in Block 2, in Resubdivision of Blocks 11 and 12 in the Resubdivision of the Washington Park Club Addition to Chicago in the South Half of the Southeast Quarter of Section 15, Township 38, Range 14, East of the Third Principal Meridian, in Cook County, Illinois. The original agreement is signed by one of the clerks in my office. I cannot read that first signature on the escrow agreement; the second one is Arthur Basse and the next one is the First National Bank of Englewood by Anderson & Anderson, and then the initials of my clerk are there. His name is Daniels. I think his first name is Edgar. That first signature is Earl B. Dickerson. The escrow agreement was signed about May 26, 1937. There was no further money put up with reference to this escrow agreement. This is not an amended agreement, it is a new escrow agreement. I was under the impression that they amended the old agreement, but on making comparisons with the copy I have in my files I see that they evidently abandoned the old one and drew a new one. I did not meet any of the parties at the Chicago [fol. 151] Title & Trust Company at any time. On the morning of the 27th Mr. Olsen called up in reference to doing something in regard to stopping the escrow. I went in then and conferred with the Law Department of the Chicago Title & Trust Company about it. After my conference with them, I wrote a letter dated May 27, on my letterhead, signed Anderson & Anderson by myself, to the Escrow Department to stop the escrow. After that I did not go down to the Chicago Title & Trust Company to see whether or not the deeds had been delivered. I was subpoenaed to appear here.

(Witness excused.)

ARTHUR A. BASSE:

Direct examination.

By Mr. Churan:

My full name is Arthur A. Basse. I am a lawyer and my office is 140 South Dearborn Street. Have been admitted to practice law in Cook County, Illinois, since June, 1906.

I represent the defendant, J. B. Crook and his wife in this case. I was the attorney for Jay B. Crook in the escrow, Chicago Title & Trust Company Escrow No. 106146. My signature appears on Plaintiffs' Exhibit 20. I assume I was present when the first signer, Earl B. Dickerson, signed. I don't know if that was Mr. Earl B. Dickerson represented in this transaction. I got the deed, I think, from the First National Bank to Crook. I don't know what day I drew it down. I met Mr. Dickerson at the Chicago Title & Trust Company in reference to this matter before the deeds were [fol. 152] drawn down. I don't know who put up the money for the purchase price, Mr. Crook, my client, put up part of it with a cashier's check for a thousand dollars is my recollection. I do not know on what bank the check was drawn. It was made payable to the Chicago Title & Trust Company. There was a letter of opinion issued, which is usually followed by a guaranty policy; to my best recollection I never saw the guaranty policy. Only the letter of opinion was delivered to me. I could not tell to whom the policy was delivered.

(Witness excused.)

ARTHUR A. BASSE:

Direct examination.

By Mr. Churan:

I have never met Mr. Pace. I saw him here in the court room but I never had the pleasure of meeting him. I have had the pleasure of talking with him the last day or so.

(Witness excused.)

HARTZELL GIVEN:

Direct examination.

By Mr. Churan:

My full name is Hartzell Given. I live at 826 South Wabash. I am Escrow Clerk at the Chicago Title & Trust Company, on the Fifth Floor, Room 507, 69 West Washington Street, Chicago. I was subpoenaed to bring with me Escrow File 106146 and I have it here. It was opened on

the 21st of April, 1937. According to the escrow, there was a thousand dollars put up by Arthur Basse and Earl B. Dickerson. The only memorandum I have as to who put [fol. 153] up the money is the escrow agreement. The escrow was considered settled on June 5th, 1937. Plaintiffs' Exhibit 20 is part of our files. Plaintiffs' Exhibit 21 for identification is part of this escrow file. The memorandum is made by the party handling the deal. In this case it was made by a man named Aldrich. His position was similar to mine. He is not in the Department now; I don't think he is with the Company any longer. He left prior to the first of August or July of last year. I don't know where he lives now or where he is. This paper, signed by James Joseph Burke, dated 5-21-37, is part of that escrow.

(Witness excused.)

FRANK X. STROBL:

Direct examination.

By Mr. Churan:

My full name is Frank X. Strobl. I live at 7600 Cregier, Chicago, Illinois. I have owned the property at 6112 Vernon, in the Washington Park Subdivision, twenty some years. I was the owner of that property on the first of February, 1928. I was one of the signers of the restrictive agreement, Plaintiffs' Exhibit 5 for identification. I still own that property. It is occupied by white people. It has always been so occupied. It is on Vernon Avenue between 61st and 62nd. It is located on the west side of the street, just one block east of South Park. I am familiar with the people living in that block. No part of the block between 61st and 62nd on either side of the street has been occupied by colored people at any time. Vernon Avenue from 62nd [fol. 154] to 63rd is all white. From 60th to 61st on Vernon has been white up to recently, within the last month, I guess. I am a member of the Woodlawn Property Owners' Association. A contributing member. I pay my dues, have been a member ever since it started, ever since we signed the agreement, I guess, about 1928 or something around that. I attend the meetings of that organization regularly. I know James Joseph Burke, knew him when he was presi-

dent of the Woodlawn Property Owners' Association. He was active in enforcing this restrictive agreement, up to last year.

Cross-examination.

By Mr. Stradford:

I testified that I signed the document known as Plaintiffs' Exhibit 5. That is my signature on page 19 of Plaintiffs' Exhibit 5. I signed it at my house. It was in the evening, but I could not say about the date. There were people there, Mr. Hellman and Davidson. They are members of the Woodlawn Property Owners' Association. They were officers of that organization, Davidson was a Notary Public. As near as I can see this document is in the same condition now as it was when I signed it. It may be a little older, torn, if you want the condition of it. All those pages were there. This was the last page of the document. There might have been other pages, probably, I said, this is all right, that is as near as I remember they were all in that shape. This is the document that I signed. Nothing else was there.

Cross-examination.

By Mr. Dickerson:

I said I owned this property February 1, 1928, and that no colored people have ever occupied it. I go there, 6112 [fol. 155] Vernon Avenue, probably two or three times a month. No colored people have lived in the block between 60th and 61st Street on Vernon Avenue until recently. The people that live there are residing on the corner of 60th and Vernon, on the southwest corner. It is a three-story building, apartment, probably nine or twelve apartments. It might be twenty-four apartments. I do not know how many colored families live in that building. I don't know anyone that lives in 6004 Vernon Avenue. If they do live at 6006 and 6024, two families, I do not know that. Some white people live in that building. I don't know whether there is any empty apartments there or not; I know there is a mail man living in there that I do know. I am familiar with Rosenberg, who has a *a* dry goods store at the northwest corner of 61st and Vernon. There are two stories to that dry goods store. People live upstairs there over that

dry goods store. I have not been in the apartments upstairs. I did not say whether colored or white live there. The other end of the block is where the colored lives. Those are the only colored people that live in the 6000 block. If Mr. Sevadron, the man you are referring to, is the janitor, he has lived in that corner apartment but I don't know his name.

Cross-examination (Continued).

By Mr. Stradford:

Referring to Plaintiffs' Exhibit 5, I stated that that instrument is in the same condition as it was at the time I signed it, except for its age. I don't know whether that piece of paper was pasted on there at the time I signed it. I don't know whether or not, in the space where the Peltons are supposed to have signed, any erasures had been made at [fol. 156] the time I signed it, or whether the names of the Peltons appeared there. I might never have seen page 7, I looked at the head; did not read all the names. I did not look at all the pages. I looked at which I was signing, sir. I do not know whether the name of Broadbend appeared on the same page near the top where there are some erasures or not at the time I signed, or some other name. I know that there was a full list, but I did not read all the names. That page might not have been in there. I can say yes, it was in there, because it was all there, every signer was in the back. I would not say whether any of those red marks were on there. I do not know whether the names of Audrey Tyler and Ruth Tyler appeared on page 9 of that document at the time I signed it. I don't know whether the word "Sold" was on there. I don't know whether the names Oscar Holquist and Anna Hulquist appeared on page 11 of that instrument when I signed it. I do not know whether there were any erasures on that page at the time I signed it.

Redirect examination.

By Mr. Churan:

Within a month colored people have moved in the building on the corner of 60th and Vernon. Prior to that time it was occupied by white people.

(Witness excused.)

MOSLIN M. CANNON:

Direct examination.

By Mr. Churan:

My full name is Moslin M. Cannon. I have resided at 6229 Eberhart since 1912. I am the owner of that property. [fol. 157] My wife's name is Lena M. Cannon. I own that property jointly with my wife. It is located on the east side of Eberhart, between 62nd and 63rd. It is a two-flat brick building. They are all brick buildings in the block from 62nd to 63rd, some of them are large buildings, most of them are two flats. There is a large twenty-four flat, a three flat building and a church across the street from my house, the Trinity Congregational Church. I think the church was put there in '15. It has a white congregation. Colored people have never lived on either side of that street during the time I have occupied that property. It is now occupied by white people exclusively. I am a member of the Woodlawn Property Owners' Association, have been a member ever since I have been there. I attended the meetings. In the beginning they were not regular, but lately they have been more regular. I remember the time that James Joseph Burke became President of the Association. From that time on the meetings were more regular, I believe once a month. The property owners and neighbors attended the meetings.

Cross-examination.

By Mr. Dickerson:

I said that my name is Mr. Cannon. I am a Railway mail clerk. I began that work in 1905. I was appointed originally at St. Louis, Missouri. I have lived at my present number since 1912. Louis del Fevero lived there before I bought it. I am a member of the Association, the special assessments is a division of the Association, the name has been changed, but the Association has had the same objects in view at all times. I don't think it is connected with Ku Klux Klan organization. Trinity Congregational is the [fol. 158] name of the church. Yes, I am a member. Have been a member longer than five years, but I don't know how

long. I have seen colored people in that church, they were visitors. It is certainly a white congregation. Because colored people have come in there to visit does not change the congregation. I know that all the members of that church are white. I will swear to that.

(Witness excused.)

MAY F. CHURAN:

Direct examination.

By Mr. Churan:

My name is Mrs. May F. Churan. I have resided at 6210 Vernon Avenue, Chicago, Illinois, for about twenty years. I own that property, have owned it twenty years. It is on the west side of Vernon Avenue between 62nd and 63rd. I am the wife of Charles A. Churan, one of the attorneys in this case. I am a member of the Woodlawn Property Owners' Association, have been a member since it was organized, I believe, in 1927. I am not an officer in the main body, but am Chairman of the Ladies' Auxiliary. I know Mr. James Joseph Burke. He severed his connection with the Woodlawn Property Owners' Association on the second Tuesday of February, 1937. He gave in his resignation on that date to take effect March 1, 1937. I heard him make his resignation at the regular monthly meeting of the Woodlawn Property Owners' Organization or League. The association held its meetings on the second Tuesday of each month. In the latter part of March, I met Mr. Burke on 61st Street, he said that he was going to sell property in the [fol. 159] Woodlawn District, that is in the Washington Park Subdivision, and he intended to place niggers in every block in the Washington Park Subdivision. I told him I was surprised to think that a man that worked the way he had in the organization would do anything of that sort; but he continued and said he had already negotiated to sell two buildings in that subdivision, and that we would all wake up some morning and have a good headache. He said one was on 60th, and then he caught himself and would not say where the other one was, said he was selling it to Negroes.

Cross-examination.

By Mr. Stradford:

The attorney who has just been propounding questions to me is my husband. He is the attorney for the Woodlawn Property Owners' League. I am Chairman of the Ladies' Auxiliary, have been for about five years this spring, I believe. Mr. Burke told me that he was going to sell some property to niggers.

Cross-examination.

By Mr. Dickerson:

My birthday is the first of April, it was the latter part of March that I have the conversation with Mr. Burke on 61st Street towards Vernon Avenue. He came down the street in an automobile, and he came around the corner of 61st Street. I was shopping down there, that is 61st Street near corner of 61st, and he came around the corner and parked his car and got out and walked towards 61st Street. He spoke to me and I spoke to him. He had resigned in February as President of the Association, which resigna- [fol. 160] tion was to take effect March 1st. He did not discuss any reason in my conversation with him why he resigned. He did not give any reason why he would sell the property to Negroes. Our general conversation was—I understood that he was doing those things, and he wanted to make it plain to me that he was finished with the organization, and to make money, that he was turning over and selling to colored, when he realized he could make money out of it. We met there, and he spoke to me, and I said, "It will be soon time for my birthday;" the year previous he had been to our birthday party, and he said, "I am busy; I am selling real estate." I said, "Whom are you selling real estate to?" And then he started in. He said he was going to sell real estate in the Washington Park Subdivision and he was going to place—I would rather use the other term—Negroes in every block; he said, "niggers", that is what he said. I asked him if he was not ashamed of himself, and why he should want to do anything like that to the organization and to our people there, that we certainly had supported him and been fair with him. He said, "I am going to make money out of it." We

had no conversation about past due salary owing to him by the organization. Always at our meetings, there was a statement given as to how much salary was due him, I don't remember whether he made any statement or not as to salary due him when he said he was going to resign. In my conversation with him on 61st Street he said he was negotiating to sell two buildings to colored people, one on 60th Street, and I said, "Where?" and he did not answer me. I could not say whether it was the three-apartment building at 423 East 60th Street, I don't know what build-
[fol. 161] ing he had reference to, excepting that he said on 60th Street. I am familiar with the block from 60th to 61st on Vernon. I live in the 60th block on Vernon. I would not say that I know all the people, but I know somebody in the various buildings along there, in the two-apartment buildings; I cannot say that I know everyone. There are no East Indians or Japanese living in that block and there never has been any. I have not been in every apartment, but I know the tenancy, I know that it is white. I do not know the names of all the tenants in that block. I know that they are all living under the restrictive agreement, that there are no Asiatics, as you call them, and no Negroes. I mean by white, what we term the Caucasians. By Caucasians, white blood. I have never seen any white blood. The Auxiliary of which I am Chairman, and which I aided in creating, had as one of its purposes the enforcing of the restrictive agreement. In that connection, we make, if we have any thoughts, or anybody comes to us and says that there has been any breaking of this agreement, to try to see if it has been broken, or if there are any Negroes moving into the neighborhood. If I find they have I report it to the main body. Not to Mr. Churan, the counsel, but to the President or Secretary or the Executive Manager. We also raise funds for the purpose of giving a party, naturally, if we work for any affair like that, we make all the money we can. We usually turn it over to the Association, or we handle it ourselves, to be used in any way that the members may have to spend it. Sometimes it is banked, it is kept in a bank.

(Witness excused.)

[fol. 162] JAMES J. CARROLL:

Direct examination.

By Mr. Churan.

My full name is James J. Carroll. I reside at 1358 Madison Park, Chicago, Illinois. I am in the real estate business, have been about thirty years. I am connected with the firm of Swan, Lorish & Caspers. They have an office at 47th and Ellis, 53rd and Harper, 63rd and Kenwood, and 71st and Jeffery Avenue. I am and have been for about thirty years a member of the Chicago Real Estate Board. I was chairman of the South Side Valuation Committee for two terms. The Washington Park Subdivision is commonly known as from 60th Street on the north to 63rd on the south, from Cottage Grove on the east to South Park Avenue on the west. Our firm handles about fourteen buildings in there, containing about 133 units. The subdivision is improved—there are some houses, probably 23 or 24 private residences. There is quite a predominance of two-apartment buildings and the next number comes three-apartment buildings, there are a number of six-apartment buildings, a few eight and a number of court buildings containing twelve apartments, and running up to probably, I think the largest is 36—court buildings containing 36 apartments. It is all practically improved with the exception of about three vacant lots not counting the corner of 60th and the rear end of the corner of 60th and Cottage Grove, the site of the old Edelweiss Gardens. That is quite a piece of vacant in there. Outside of that the subdivision is quite well built up with that type of improvements. It has been built up, I would say about approximately twenty-five years.

[fol. 163] Practically all the improvements are all brick. There is about 600 buildings altogether and there are about approximately 2,500 to 3,000 units. I mean by a unit, a six-flat building has six. 61st Street is, of course, a business street and that supplies—that and Cottage Grove Avenue is the shopping center for the territory, and the subdivision itself is built up rather uniformly because it is a new territory and it is a little different in that respect than some of the older territories. The buildings are all quite uniform in architecture and their height and so on. There are building lines, the buildings appearing to be set back

evenly. The building lines, of course, are on the residence streets, such as Vernon, St. Lawrence, Champlain, Eberhart and Rhodes, north and south streets. 60th Street is a residential, it faces a park. 61st Street is a business street. 62nd is a residence street, too, from South Park to Cottage Grove. The parkways, all the residential property has parkways and they seem to be kept in pretty good order, lawns and a number of streets have a very nice—have been planted with shade trees. I have with me a map showing the subdivision. I have checked up on these improvements pretty generally. This as an accurate map of the territory as it stands today, and is a correct map of the streets. 6140 Rhodes Avenue is between 61st and 60th—60th and 61st—61st and 62nd on Rhodes Avenue. 6140 Rhodes is four and a half, five blocks from South Park and 60th. It is almost in the center of the district, this Rhodes Avenue is. I do not reside in the district myself. I have noted that colored people moving in the district does affect the—quite materially the value of the other properties in [fol. 164] the district and it creates among the other owners, white owners of property, a sort of a panicky condition. They want to get out and sell, and frequently sell at very distressing prices. It is pretty hard to give any percentages in the depreciation value. There is quite a material depreciation, though, when that happens.

Cross-examination.

By Mr. Stradford.

The buildings in the area covered by this map are approximately twenty-five years old. I don't think they are thirty-five or forty. Assuming that some of the buildings in there are twenty-five to forty years old, we are allowed to take depreciation of the property for age, but if the properties are well kept up from time to time by the owners the depreciation isn't so great. There is not much physical depreciation, it is largely a matter of getting a little old-fashioned. I don't think there are any frame buildings in that area. I don't know what the foundation of the Washington Park Hospital is—it may be—that is stucco over. That might be a frame foundation under the stucco. I don't know of any frame buildings on Langley Avenue in the 60th block, but it might be possible. I don't remember any on Evans. In a general way I am familiar with what is

now the near loop district from 12th Street to 22nd or 31st Street. I remember when the colored people occupied that district as a residential district. It is not now occupied by whites for residential purposes. It is mostly zoned now for business purposes and of course they are business blocks in there. There are some whites living on Prairie or Ellis in that neighborhood, I think. That is what is known as [fol. 165] the First Ward, I presume. I don't know much about ward boundaries. I think there are some whites on Indiana, Wabash and Michigan. It was formerly white and then went colored. It is mostly colored yet, I think. There are some whites in there now. Depreciation in districts where colored become tenants is not altogether due to the fact that the buildings in the district were old at the time they went in. I don't know any new district where colored occupied as tenants when the buildings were in first class shape. The depreciation sets in when the whites move out of the district. It is somewhat the experience here in Chicago that they move out of the district as a rule when the property becomes old, from twenty-five to thirty-five or forty years old. Improvements in the block between 61st and 62nd on Rhodes Avenue all look good and the streets are well kept.

Cross-examination.

By Mr. Moore:

Ordinarily, if the area described was wholly surrounded by colored population, that would affect the valuation of the property. I think, the fact that the surrounding area is all colored so that this area constitutes a white pocket so to speak within the colored area reduces the value of the property some.

Cross-examination.

By Mr. Dickerson:

I said the property depreciated upon the coming in of colored people, the white owners of property of course get panicky and toss their property on the market at distress prices, and of course that depreciates value. I don't think the coming in ipso facto of colored people depreciates the [fol. 166] physical value of the property, but there are a lot of things that enter into the valuation of property

besides the physical. When we are called upon to appraise property in a given area, the fact that colored people occupy the particular property under appraisement does affect the valuation that we place on it. I have been in the business of renting property in this community a long time. I consider rentals as one element of valuation in property appraisals. It is hard to say to what percentage rentals are considered as a very important part of the valuation. When we appraise property we appraise it, we square it up in several ways. We take the land value, the physical value of the property and what it can be reproduced for, less the depreciation; add those together and that is what we call a summation of the value. We don't use that as our real value. Then we take the rental value of the property, and not the gross rental, but the operating expenses deducted. In some buildings the operating expenses run much higher than others. We take the net rent, capitalize the net rent, then we square off the two together and then we also take into consideration the market value. When colored people move into territory that has previously been occupied by white people, for the time being there is a little increase in rents because of the fact that they want to get into that particular territory because it is new territory. I don't know that there is much of any increase but there is a demand, of course, because of colored coming into that white territory, then later on the depreciation sets in.

(Witness excused.)

[fol. 167] Leo T. Heid:

Direct examination.

By Mr. Churan:

My name is Leo T. Heid. I live at 6416 Greenwood Avenue. I am an insurance broker. I am and have been since last March president of the Woodlawn Property Owners' League. In March of last year the Woodlawn Property Owners' Organization was reorganized and new officers and directors and committees appointed. Mr. James Joseph Burke was not retained as executive manager. He made a statement as to a balance that allegedly was due him. In reorganizing, the League includes the Washington Park

Subdivision. The Association included it before, and at the present time it includes all of what is known as Woodlawn. The general meetings of the Association are normally once a month. Sometimes they are once in six weeks. They run over. It was not necessarily because of money matters that Mr. Burke resigned his office in the Association.

(Witness excused.)

GEORGE L. GRIFFIN:

Direct examination.

By Mr. Churan:

My full name is George L. Griffin. I am an attorney at law, connected with the Chicago Surface Lines, having been connected with that corporation nine years. I am and have been for approximately two years secretary of the Woodlawn Property Owners' League. I am intimately acquainted with James Joseph Burke. I am familiar with [fol. 168] his signature. That is James Joseph Burke's signature on Plaintiffs' Exhibit 22. He is the same James Joseph Burke who was the former executive manager of the Association. I live at 6111 Rhodes Avenue. My mother and I own that property in joint tenancy. That is between 61st and 62nd on Thores. My mother owns the property at 6050-52 St. Lawrence and 552 and 554, that is 552 and 554 East 61st Street, all part of the same building. I have lived in the same neighborhood for approximately eight years. Colored people do not live on St. Lawrence Avenue between 60th and 61st, have never lived there, nor between 61st and 62nd Street on St. Lawrence, nor between 62nd and 63rd on St. Lawrence Avenue.

(Witness excused.)

MARY RYAN PYLE:

Direct examination.

By Mr. Churan:

My full name is Mary Ryan Pyle. I live at 6222 Vernon Avenue, have lived there eighteen years. My husband and

I own that property. My property backs up on property which fronts on South Park Avenue between 62nd and 63rd. I am familiar with the properties and the people who live in the block from 61st to 63rd Streets on South Park Avenue. There are absolutely no colored residents in any of those buildings. There have not been at any time since February 1, 1928.

(Witness excused.)

[fol. 169] HARRY E. RAYMOND:

Direct examination.

By Mr. Churan:

My full name is Harry E. Raymond. I am a lawyer. I saw Mr. Israel Katz at the Department of Education and Registration, Chicago, Illinois; it was either the hearing on January 9, 1937, or at a subsequent hearing shortly after that I heard him testify. The proceeding was in reference to a complaint against William I. Sexton, a colored real estate broker in Chicago. I questioned Israel Katz and I heard his answers. I asked him, "Would you sell your property at 6018—" I think the number was—"Vernon Avenue, Chicago, Illinois, to the colored people, notwithstanding the agreement that is recorded in the particular district, Washington Park District, in which your property is located and in which you—the owner, then owner of your property was a signer, or yourself?" And he said, "Yes, I would. I would sell it to anybody that I could get a buyer to purchase it. I would sell it now if I could." That was subsequent to Hansberry moving into that premises as I recall it. I believe that hearing was along about July 9th. This hearing of the Sexton matter was started over there on March 7, 1937. Katz was made a party defendant to this proceeding. This case was started the latter part of last year or the early part of this year—or no, that would be 1937, yes, that is right, a year ago. The complaint was made as of February 20, 1937. I have a copy of the complaint in my file there, if I may refer to it. The complaint sheet shows March 6, 1937, based upon February 20—complaint of February—an advertisement of February 20, [fol. 170] 1937, that is what a copy of the complaint sheet shows, so that this testimony would be subsequent to that.

Cross-examination.

By Mr. Stradford:

I don't believe they have decided the complaint yet, Mr. Stradford.

(Witness excused.)

GEORGE WASHINGTON COOK:

Direct examination.

By Mr. Churan:

My full name is George Washington Cook. I live at 6006 Eberhart Avenue, 3rd Apartment, Chicago, Illinois. That is in the Washington Park Subdivision. I own the property that I live in. My property is 82 feet frontage facing the park by 150 deep to the alley, consisting two buildings facing the east, a six-apartment and a five-apartment. It is on the west side of Vernon Avenue facing the east. Across on 60th Street is Washington Park. Directly west of me is the old Washington Park Hospital and a frame building in between. I have lived in the subdivision 24 years. I have been over the subdivision practically every day. It is about two blocks and a quarter from South Park Avenue and 60th Street. I am absolutely familiar with the people that live on Eberhart from 60th to 61st Street since February 1, 1928. I have canvassed the block as captain of the block. There have absolutely no colored people or Negroes ever lived in the block between 60th and 61st on Eberhart. No colored people to my knowledge have ever lived on Rhodes Avenue between 60th to 61st. I was on [fol. 171] the board of directors of the Woodlawn Property Owners' Association from the beginning, before Mr. James Joseph Burke took charge and am on the board at the present time, which is about 11 years. I think the Kleiman Building is at 417 East 60th Street. I was a director of the Association when an action was started to get the colored out of that building. That was in the case of Burke vs. Kleiman. The colored people were gotten out. That was the nearest colored to my property. There are colored on South Park between 60th and 61st. There was one recently on 60th between South Park and Vernon. I don't

know the full facts to that. That was west of the Kleiman Building. I know where the Harrower residence used to be, but I couldn't swear whether it is colored or white. There are no other colored violations, residences of colored people in the subdivision outside of South Park Avenue and 60th that I know of.

Cross-examination.

By Mr. Stradford:

I have canvassed that district as captain of our block—as a member of the board of directors of the League. I canvassed 60th to 61st Street on both sides of the street in the interests of our League. The Washington Park Hospital is located at 60th and Vernon. The hospital building is there now and has been there quite a while. It is operated as a rooming house. It is not a hospital now. It ceased operating as a hospital two and one-half to three years ago, to my best knowledge. I believe, up to that time it was operated as a hospital for about a year unsuccess-[fol. 172] fully and then previous to that it was not occupied at all, oh, I should judge for well, quite a long time, three or four years or so.

(Witness excused.)

JOSEPH BONNEFOI:

Direct examination.

By Mr. Churan:

My full name is Joseph Bonnefoi. I am a practicing attorney at the Cook County Bar. I live at 2743 Windsor Avenue, Chicago. My office is located at 77 West Washington Street, Chicago. The case of Plath, Executor under the Last Will and Testament of Ida Plath, deceased, against Edward G. DeLaunty, et al., General No. 35-C-8078, was a foreclosure proceeding of the premises No. 549 East 60th Street. That was a three-flat building. I know Richard O'Brien, he was appointed receiver in that foreclosure. While the matter was pending a first apartment in this building became vacant. That is Mr. Carl A. Hansberry, who moved into that property, he and some other woman, or

another woman got possession to that—or he got possession through some other woman, I believe. The woman's name was Ruth Hoffman. I was subpoenaed to court this morning, and I haven't been coached, or told what I was to testify, just came in to the court room as the court came in session. The proceedings were started to get this Ruth Hoffman and Hansberry out of the property. There was a decree entered in this court, an order for them to vacate. That was appealed to the Appellate Court and affirmed. I had a writ of assistance issued in that proceeding against [fol. 173] Ruth Hoffman and Hansberry. In that case we described Mr. Hansberry as N. L. Hansberry, but I know it is the same person that I have identified in the court room as Carl A. Hansberry. The date of the issuance of the writ of assistance is May 7, 1937. I think it was delivered to the sheriff on the same day, May 7, 1937. I ordered it executed. After I ordered the writ of assistance, Mr. Stradford, the attorney for Mr. Hansberry, asked me to give him more time because I guess one or two children were going to a school in that neighborhood and he did not want to take them out of school until the end of the semester. He was the attorney for Hansberry and Ruth Hoffman in that proceeding in the Appellate Court and in the Circuit Court. At first I had to get in touch with my client and then afterwards I told him that I would hold it off, I don't remember whether it was up to the 15th or the 20th. I think it was up to the 20th that he wanted time. Mr. Hansberry moved out of that apartment. Personally, I don't know where he moved to. I don't know Mr. Arthur A. Basse. I don't remember talking to him over the telephone with reference to representing somebody as buying some property.

Cross-examination.

By Mr. Stradford:

I could not remember for whom you entered your appearance, Mr. Stradford. I know you were in the case, that is all I know. My statement that you represented someone else is just from my own idea and not from the record.

(Witness excused.)

Patrick Hayes, residing at 6119 Champlain Avenue, [fol. 174] would testify that he owns that property and he

has lived there since 1918 continuously, knows the neighborhood and the people residing on Champlain Avenue from 60th Street to 63rd Street, and that he knows of his own knowledge that no Negroes or colored people have lived in any of the buildings on that street between 60th and 63rd Streets since February 1, 1938.

Mrs. William L. Graf would testify that she resides at 6110 Langley Avenue and has lived there 27 years, owns the property and is familiar with the neighborhood of Langley Avenue and the buildings thereon from 60th to 63rd Streets and knows that no Negroes or colored people have lived on that street between 60th and 63rd Streets since February 1, 1928.

Mrs. Nellie Benson would testify that she resides at 6206 Evans Avenue. She and her husband own that property. They have lived there in that subdivision for 30 years. She knows the neighborhood on that street from 60—that is from 61st to 63rd Street—the street does not run, Evans Avenue does not run through to 60th Street —from 61st to 63rd Street, and is familiar with the neighborhood and the people residing in it, and knows positively that no Negroes or colored people have lived on that street in those blocks at any time since February 1, 1928.

HARRY H. PACE:

Examination.

By Mr. Churan:

My full name is Harry H. Pace. I live at 413 East 60th Street, have lived there since April 29, 1937. I am one of [fol. 175] the defendants in this case. Prior to moving to 413 East 60th Street, I lived at 624 East 51st Street in Chicago, Illinois, from about July 23, 1929, the time I came to Illinois. I am commonly known as a colored person. My chief position is president of the Supreme Liberty Life Insurance Company at 3511 South Parkway, Chicago, Illinois. I am an attorney, admitted to practice law in Illinois. My office is at 3511 South Parkway, the office of the president of the Life Insurance Company, another defendant in this case. Mr. Earl B. Dickerson and Mr. Truman K. Gibson, Jr., represent the Supreme Liberty Life Insurance Company and myself in this case. Mr.

Earl B. Dickerson is general counsel for the Insurance Company. He has been general counsel for the company since long before I became connected with the company. All the other officers of my company are also colored people. I do not pass on the loans. I am chairman of the Executive Committee and I preside at all meetings of the Executive Committee where loans are submitted for approval when I am in town, but I don't pass on them. When I was in the Presbyterian Hospital some four years ago he came to call on me and said he was taking office space in our building and asked if we had any office space and I said, "No, I practice out of my own office. I have plenty of room." Would I object to his putting my name on the door and on the window? I did not see any reason for so objecting and I did not object and that is all there was to it. That was at 3507 South Parkway. The office of the Supreme Liberty Life Insurance Company is 3511. Same building but downstairs, whereas 3507 is upstairs. The Insurance Company owns the building free and clear. [fol. 176] Formerly one portion of it was occupied by the Roosevelt Bank. I don't know that my name appears as a member of the firm Bibb, Tyree & Pace in the 1936 law directory. I don't think I have seen it. I don't say that it does not appear. I merely state that I don't remember having seen it. I have seen him. I don't know that I have seen him in three months now or four. He hasn't left the building. I merely said that I haven't seen him actually, since about Christmas time. I have known Mr. Henry Lutz two or three years. I don't recall exactly. I have met Mr. James Joseph Burke two or three times, sometime last year was the first time I ever saw him, before I moved into 413 East 60th Street. It is in the Washington Park Subdivision on 60th Street between South Park Avenue and Vernon, on the south side of the street. It is a stone front building. I think the sides are brick. They are pretty close to other houses, and the rear is brick. Two-story and basement. I first became interested in that building the latter part of April, 1937. I don't know the exact date. I came back in town and there was an application by Edward E. Parrish for a mortgage before the Executive Committee. I know Mr. Parrish. He lives in New York. 467 East 60th Street, New York City, doesn't sound like his address. It is not a fact that Mr. James Joseph Burke took me into that building before I moved into it to look

at it. I don't remember the date that that property was sold by Harrower to Lutz. I think I have seen the deed from Harrower to Lutz. It was sometime in May of last year. I think Mr. Parrish is white. All that I did with reference to the application for loan by Mr. Parrish was [fol. 177] to consider it among others that were considered at the Executive Committee meeting. I preside at the meeting and hear the facts concerning them; don't even vote in the committee. I did not inquire as to where the property was. The application would recite, the name and the amount. The amount of the loan asked for was $3,500.00. I had no conversation with Parrish as to how much he paid for that property. I did not know at the time that the consideration from Harrower to Lutz was $3,000.00. The loan was made by the Supreme Liberty Life Insurance Company on that property for $3,500.00 I don't recall the date. It was sometime in April, 1937. I do not know when the deed from Lutz to Parrish was made. I know nothing about that deal at all, except what I have told you. I did not have any talk with Mr. Joseph D. Bibb. I did not know that Bibb submitted—took up this matter with Lutz. I do not know any other attorney by the name of Bibb. I took possession of that building on the 29th of April. I had not made any extensive repairs on the building. I was in the building after the loan of $3,500.00 was made, sometime within the next few days after the application for the loan was approved. I moved all the furniture in at the same time. I don't know who made the repairs in that property. There were some repairs made preparatory to my moving in. I did not pay for the repairs. I did not authorize them. I would not say I knew nothing about them. I don't think the front steps of the building have been repaired. There was a cement block started to be repaired. It wasn't finished. My wife and I visited that property two or three times [fol. 178] between the 19th of April and the 29th of April, when I moved in, not usually in the evening, any time that would be convenient. Because I was considering moving into it I went there to look at it. I was not considering the purchase of it at that time. Parrish lived in New York all the time. I don't think he was here in Chicago at any time between April 19, 1937 and the 29th of April, 1937. I never saw him. I have known him two or three years. I do not know whether a deed was made out from Lutz

to Parrish and who drew the deed. I don't know that anybody brought it to my attention. You are laboring under a false impression. I did not make the loan for that property. The Insurance Company made the loan. I did not make any investigation before the loan was made on that property. It is not my duty or part of my business. I see the words "Mail to Edward E. Parrish, 59 West Tenth Street, New York City, N. Y.," on Plaintiffs' Exhibit 16. I don't know whose writing that is. If Mr. Earl B. Dickerson wrote it, that does not look like his general writing. I do not recognize that writing on Plaintiffs' Exhibit 15, "Mail to Henry Aloysius Lutz, 415 South Franklin Street, City." It certainly does not look like Mr. Dickerson's writing to me. That looks like Mr. Dickerson's signature on Plaintiffs' Exhibit 17. I moved into the property on April 29. I don't know where the trust deed was. I don't know who sent the instrument to New York. As president of the Supreme Liberty Life Insurance Company I mean to tell the Court that I do not know. I suppose Mr. Dickerson, if you want my supposition, handled the matter, but I don't know. I did not instruct [fol. 179] Mr. Dickerson to handle the matter. I did not instruct Mr. Dickerson to look at the instruments and at the papers and have them executed. I didn't have the legal description for this mortgage made on the 22nd day of April, 1937. I did not put it into the trust deed. Mr. Dickerson as general counsel of the company possibly drew it. I don't know who drew it. I did not inquire as to how much Lutz paid for that property. I don't know it to be a fact that $500.00—the difference between the three thousand and the $3,500.00 loan—went into the repairs of that property. I know nothing about the details as to whether any part of the $3,500.00 loan went to secure the deed from Harrower to Lutz. Mortgage loans are handled by the treasurer of the company. I don't know what was the purpose of making this trust deed to the Chicago Title and Trust Company instead of making it to the Supreme Liberty Life Insurance Company. I don't know whether or not all our loans are made to the Chicago Title and Trust Company. I do not handle any details pertaining to any mortgage loans. I am president of the company and I have varied numerous duties but I do not handle details in connection with mortgage loans. I don't know

if there is in our file among our loans any other trust deed to the Chicago Title and Trust Company for a loan that our company made. I did not make a loan to Mr. Jay B. Crook on 6410 Rhodes Avenue property. I know that my company made a loan to Jay B. Crook and his wife on 6410 Rhodes Avenue property. Yes, I know Mr. Hansberry casually. I don't think I have known Mr. Hansberry more than a year or two. I did not have any conversation with him about this property at 6410 Rhodes Avenue. As- [fol. 180] suming that $4,400.00 is the correct figure, yes, I knew my company made a loan on that piece of property. I mean to tell you that I never discussed the question of the loan with Mr. Hansberry. I never discussed the loan with Mr. Crook. The treasurer does. Mr. T. K. Gibson, Sr., is the treasurer, Mr. Gibson here is his son, one of the attorneys, for me, and the company in this case. I had no discussion with the Executive Committee before this loan was made to Parrish on the property that I subsequently moved into. Never participated in any discussion about the loan until it came up in the committee meeting. I did not know how the loan came into our office.

I had no reason to be surprised. We advertise for loans every week. I was presiding as chairman of the Executive Committee when this loan was under consideration. I don't recall what I said or what I may have said. It was just another application for a loan. I don't know whether any of my committee knew Parrish or not. I do not know when this deed came back from New York, the trust deed from Parrish to the Chicago Title and Trust Company. I am positive that I did not see the deed. I do not know who recorded it. No, I never did investigate to see that the deed from Harrower to Lutz and the deed from Lutz to Parrish were recorded at the same time on the 21st day of April at 1:48 P. M., the deed from Harrower to Lutz being recorded as document number 11983900 and the quit-claim deed from Lutz to Parrish as the next consecutive number. I wouldn't say I was not interested in that. I simply didn't know. Just as far as I am concerned it was just another mortgage. We have maybe a couple hundred [fol. 181] or so other mortgages. Our outstanding loan value is between three and four hundred thousand dollars; some paid off and some reduced. It is not a part of my duty to know whether this was a good loan or good risk. I have so much to do that I don't try to do anything except

that which I am compelled to do. Shortly after I saw the application for the loan and found out about the property, I decided to move into the property. If I had known that the property was for sale and known about it I would like to have bought it myself. Subsequently, I bought it. I was in possession at the time I bought it. The deed to me is dated the 17th day of May, 1937, and recorded the 12th day of June, 1937, as document number 12011704. I don't know whose writing that is on the outside of the quit-claim deed, "Mail to Harry Pace, 413 East 60th Street, Chicago." No, I did not send the deed to Parrish to New York. I am a defendant in the case of George W. Cook and others against Henry A. Lutz, Harry H. Pace and others, General No. 37-S-6290, in the Superior Court, in which action a complaint was filed against me and others in that case on the 12th day of May, 1937, to enforce the restrictive agreement against that property and against me, I had my attorneys enter an appearance in that case. Earl B. Dickerson and Truman K. Gibson were my attorneys in that case. I suppose the Supreme Liberty Life Insurance Company is also a defendant in that case. I did not know they were, but I guess they are. Yes, I have known Mr. Lutz for a long time. I don't recall who his attorney is. Perhaps it has been called to my attention that Mr. Irvin C. Mollison is his attorney. I said I did not recall. I do know now that Mr. [fol. 182] Mollison is Mr. Lutz' attorney. I have seen some of Mr. Bibb's writing. I don't know that I know much about it. I think that is Joseph D. Bibb's signature, referring to the last page of the answer of Edward E. Parrish and Aeolian Parrish in that case in the Superior Court, involving property at 413 East 60th Street, filed on the 29th day of June, 1937. I probably have discussed this matter with him as his representing Parrish. I did not engage Bibb to represent Parrish in that case. I think Mr. Bibb has spoken to me about the loan on 413 East 60th property. I don't know the time nor the place but undoubtedly in all the discussions that have taken place I will say yes, that he has. He did not discuss the loan with me before it was passed upon by the Executive Committee. I am sure of that. I would not know Mr. Jay B. Crook if he were in the audience now. I have seen him. I testified before that my company made a loan to Jay B. Crook and wife on the property at 6140 Rhodes Avenue. I did not inquire as to who the mortgagor was. I did not look at the property. Since this liti-

gation started I drove through that street one day and I don't know whether I saw the exact property or not, but I saw a house that I thought was the property. I don't recall the terms of the loan, but most of our loans are installment loans. It was not part of my duty to find out as to what kind of a person this man Crook was, as to whether he was responsible or otherwise, when this loan was made to him. I presume I presided at the meeting when the Executive Committee of my company discussed the question of that loan, though during that period I was out of town [fol. 183] considerably. I do not know when the loan was made. I did not see the property before this mortgage from Cook to the Chicago Title and Trust Company was made on the 1st day of May, 1937. I never saw Crook, never talked to him about it. I never had any conversation with Crook at any time. I remember sometime meeting Crook and being introduced to him but I don't know him. I had no conversation with Mr. Hansberry. I did not know that Hansberry was going to move into that property the day before he got a deed to it. I sign such checks as may be presented to me when I am in the office. We have so many checks to sign they are divided among the officers, checks signed and countersigned. I assume that the check that went out to pay the $3,500.00 loan on 413 East 60th Street property which I now occupy is in the company's possession. It isn't in my possession. I do not know who cashed that check. We have accounts in 33 banks in about 26 cities and I assume that that check was on a Chicago bank because it was a Chicago transaction. Would be happy to produce it if you want it. I don't know whether I signed the $4,400.00 check on 6140 Rhodes Avenue, or not. I was out of town during the latter part of May and if this transaction, as I seem to recall, happened then—I may have signed it and I may not. I don't recall any particular ones. I don't know that that deal was closed at the Chicago Title and Trust Company on or before the 26th day of April, 1937. I don't know the date when the check was issued. I will obtain the check if you want me to and try to find out. I do not know that the check from my company to Crook for this $4,400.00 loan was deposited with the Chicago Title [fol. 184] Trust Company on this escrow 106146 on the 21st day of April, 1937. I never saw Plaintiffs' Exhibit 9 which is the deed from First National Bank of Englewood to Jay B. Crook, dated the 15th day of May, 1937, document num-

ber 12003437. I know nothing about the delivery of that deed. That looks like Mr. Dickerson's signature on the mortgage on the property at 6140 Rhodes Avenue, dated the 19th day of May, 1937, from Jay B. Crook and his wife to the Chicago Title and Trust Company for $4,400.00, securing a note of $4,400.00, payable to bearer, and payable at our office. I am now occupying the property at 413 East 60th Street. I do not know when Mr. Hansberry moved into 6140 Rhodes Avenue. I was down in Augusta, Georgia, on the 26th day of May, 1937. I think they use a form that is purchased from Horder's or some form of that sort for application for loans. I have been president of the company for about eight, a little more than eight years. Never been secretary of the company. We don't use an application for each and every loan. It may come in by mail, it may come in by letter, attorneys come in and present applications. They come in various ways. It is not required that the mortgagor or the borrower sign any application. I am sure it is customary for my company to find out who the applicant is and his standing and the condition of the property before the loan is made. When the treasurer brings the application to the committee he has all the information which he wants to support it. I don't know the square footage that my company occupies, but it owns the entire building. It occupies a large space downstairs, much larger than is apparent from the front, and then it occupies a part of the upstairs. My office is in the extreme rear of [fol. 185] the building. You go clear through the office to get to my office. That is the Home Office of the Insurance Company. The treasurer's office is near to the front. It is the first office after one enters the lobby and goes down the corrider leaving the cashier's cage. We have four active officers, senior officers who give full time, and three or four junior officers like assistant secretary, auditor and cashier. The secretary keeps a record of the minutes, and our Executive Committee passing on loans. It is kept in my office. The secretary is W. Ellis Stewart. The Executive Committee that passed on loans in April and May of last year consisted of W. Ellis Stewart, secretary; J. G. Ish, Jr., agency officer; T. K. Gibson, chairman and treasurer; M. O. Bousfield, vice-president and medical director, and myself, and Earl B. Dickerson, general counsel, the same as at present. I think Mr. Dickerson was present at the Executive Committee meeting on the day when the Parrish loan

to the property that I now occupy was passed on. I assume that the check for the $3,500.00 loan was given to Mr. Dickerson to close the deal with. I don't know. I assume that Mr. Dickerson was present when the loan on 6140 Rhodes Avenue property was passed on. I don't remember. I don't know out of what moneys the $325.00 was paid to Burke for his commission at 6140 Rhodes Avenue as shown by Plaintiffs' Exhibit 22, receipt from James Joseph Burke for $325. We made a loan for $4,400.00 on the Hansberry property and it was disbursed. Now, how, when or where, I don't know. I don't know that it went into the purchase of the property that Crook was buying at 6140 Rhodes Avenue. No, I do not say I was not interested. For the [fol. 186] eight days between the 21st day of April and the 29th, until I moved into the property at 413 East 60th Street, I paid rent to Parrish when I subsequently bought the property. I started negotiations for the purchase of the property from Parrish early in the month of May, 1937. There was no lease executed from Parrish to myself for the occupancy of the property. I wrote to Mr. Parrish about making the arrangements for moving into the property on the 29th of April, 1937. Undoubtedly I received an answer. I suppose it was written. I haven't got the letter. I don't know where it is. I haven't got a copy of the letter I sent Parrish. I don't recall that I kept a copy. I may have. Probably wrote it by longhand, as I frequently do. I wrote him about it in the early part of May, 1937. I don't know the time the mortgage was sent to New York. I don't recall getting a letter from Parrish authorizing me to move into that property, 413 East 60th Street. I may have. I may have talked to him over the telephone, may have gotten a telegram. There were some workmen in there between the 21st day of April and the time I moved in. The property is a residence consisting of two floors, seven rooms and a basement. I did not say that I got a letter from Parrish, but I moved into the property.

(Witness excused.)

JAY B. CROOK:

Direct examination.

By Mr. Churan:

My name is Jay B. Crook. I live at 436 West 61st Place. I am 65 years old. I am Caucasian. I have lived at 65th Place just a year. Prior to that I lived at 513 Engle- [fol. 187] wood Avenue. That is in Englewood, on the South Side of Chicago. I met Mr. James Joseph Burke three or four years ago, something of that kind. I was in the coal business and in the stoker business, I met Mr. Burke casually in the spring of 1937. He asked if I knew of anybody that would be interested or would I be interested in a piece of property in a certain locality out there. I had no property at that time. Mr. Burke asked me to go and look at the property at 6140 Rhodes Avenue. I looked the property over. He told me the price of it, and I thought it was a good bargain at that price. That is the same property that I conveyed to Mr. Hansberry and his wife. I have known Carl Hansberry four or five years. Had business dealings with him. He was in the rooming house business, Hansberry Enterprises, I believe. His place of business was at 4247 Indiana Avenue. I believe he was living on 60th Street near St. Lawrence at the time I was looking at the property at 6140 Rhodes. Burke did not tell me that Hansberry was interested in that property. I was introduced to Mr. Olsen at the First National Bank as the prospective purchaser of the property at 6140 Rhodes Avenue. I think, as near as I can, he told Mr. Olsen that he had a purchaser, as I understand it, for the property, and we made the deal with Mr. Olsen. After Mr. Burke showed me the property, I told him I thought it was a good buy, and I would probably make a deal with him about it. The price he gave me was sixty-five hundred dollars. I did not have sixty-five hundred. My only interest in that property was to make a profit, if I could. I did not make any arrangement with Mr. Burke as to what his commis- [fol. 188] sion was to be. I suppose he made that with the bank as far, as I know. In the preliminary transactions I had no attorney. After I made my arrangements with Mr. Hansberry, we went to the Title and Trust Company, and I called Mr. Basse over there to take care of the pro-

ceedings. It was possibly a week after I saw the property when I made arangements with Mr. Hansberry. I had made arrangements with Hansberry to purchase it before I got title to it. I was not in the business of buying and selling real estate, I used to be in the second mortgage business. I had had considerable dealings with Mr. Hansberry, and I knew he was in the market for a place, because he told me so in the spring of 1937. I cannot say whether it was before I went to the bank or afterwards that I tried to get Hansberry interested in 6140 Rhodes Avenue. As near as I can remember, it was about the same time. I did not furnish any part of the $1,000.00 deposit. It came through Mr. Hansberry or his agent. I believe the check was given to me. It was on the Stock Yards Bank. I did not put any money into the property. I could not tell who furnished the $525.00 cash that Mr. Basse deposited with the Chicago Title and Trust Company in escrow. I actually bought the property, I did not pay any of my money for it. I did not have any money to buy the property. I knew I could sell the property. A lot of pieces of property are sold that way, are purchased before, and find a buyer, and the money is put up that way. My idea was to find a buyer before I actually consummated the deal. I sold it to Mr. Hansberry for around seven thousand. Without putting up any money at all I made $500.00 on the transaction. Hansberry knew that [fol. 189] I was only paying $6,500.00 for the property. Yes, I went to the Chicago Title and Trust Company when these papers and checks were put up. I know Mr. Dickerson. I don't remember his being at the Chicago Title and Trust Company at any time on this escrow though. Yes, I remember when the $4,400.00 proceeds of the loan to the Supreme Liberty Life Insurance Company was put up. I was there then. I could not tell who produced the check. Mr. Basse was representing me in the Escrow Department. As far as I knew, the $1,000.00 check was made out to the Chicago Title and Trust Company. It has been some time ago. I don't remember just who it was made out to. The check from Hansberry was produced there at the Escrow Department, was turned over to Mr. Basse, and he finished the deal there. I don't know that the check ever went through my hands at all. I believe I saw Mr. Harry Pace once, in the Liberty Life, Supreme Liberty Life Insurance Company. When this mortgage

was made, I did business with the Supreme Liberty Life Insurance Company. Before that, 1936, I believe I had a couple of small colored loans in there. Nobody brought me to the Supreme Liberty Life Insurance Company. I was directed to Mr. Gibson, I believe, at the Supreme Liberty Life Insurance Company. I don't know what his business is there. I didn't talk to anybody else about the loan that I know of. I don't know whether I made written application or not. I told him where the property was, all the little details, I don't remember. I knew it was in a restricted area—I secured the deeds from the Escrow Department at the close of the deal for 6140 Rhodes Avenue property. Mr. Hansberry was present. I don't [fol. 190] remember if anybody was representing him there at the time. There were several people there, but I don't remember just who was there. I believe there was somebody there representing the bank, I don't remember on what day it was. I did not record the deed. I had a lawyer representing me there. Mr. Basse, and he took care of the business. The loan was made to me. I don't remember the date when I signed the mortgage. I did not pay for recording of the deed. I paid the lawyer representing me. I had not made a conveyance at that time to Hansberry. I got the deed before I paid the money through the deposit money and the insurance money, I presume. I don't remember whether or not I saw Hansberry the day the deed were recorded. I did not give Hansberry a key to the apartment. I had a key to the 6140 Rhodes Avenue apartment. I don't remember that Hansberry moved into that building the same day that I got the deed. The property was delivered, the key was turned over, I don't know whether I turned it back to the real estate office, or gave it to Mr. Hansberry. I made a lease for one month with the bank to hold the apartment. I never told Mr. Olsen that I was going to occupy that apartment, I never told him that before the deal was closed I would move into that property. I had no intention of taking possession, but not moving in there. I don't know the day that Hansberry moved in, it was sometime afterwards. That is my signature and my wife's signature on Plaintiff's Exhibit 13, dated the 27th day of May, 1937. I don't remember who drew this deed. I know F. O. Washington, the notary. He is a colored man. I think he lives at 5949 Michigan. He is in the kitchenette apart-

ment business. He is connected with Hansberry or some-
[fol. 191] thing. He is working for him as far as I know. I don't remember where this deed was acknowledged. I don't remember meeting Washington, the notary, on the day this deed was executed by me. I cannot say where this transaction in reference to the deed from me to Hansberry took place. I suppose I was there, but I can't tell you just where it was. I don't remember what day I got the $500.00. $500.00 might impress all of us nowadays. I did not get the $500.00 in a check. I got it in cash money. I saw that property before I talked to Mr. Hansberry about it. I went through it. There were tenants on the second and third floors. I did not talk with them. I saw their name on the board there. I never before saw Plaintiffs' Exhibit 22, receipt stating, "Received of Jay B. Crook, $325.00, my commission on sale of property, 6140 Rhodes Avenue, Chicago; (signed) James Joseph Burke." I presume the bank paid him the $325.00. I know I did not pay him. I do not know anything about the receipt having been given to anybody. I believe I made inquiries from the bank when I bought the property as to what rent there was from that property. I believe I talked to Mr. Olsen. I signed the lease there for the rental for my flat. I suppose they were all the same. I talked to Mr. Hansberry a number of times about the property, because I do a lot of business with him, but I can't recall just how long it was before I made the deal with the bank.

(Witness excused.)

[fol. 192] EARL B. DICKERSON:

Direct examination.

By Mr. Churan:

My full name is Earl B. Dickerson. My office address is 35 South Dearborn. I am the attorney for the Supreme Liberty Life Insurance Company in this case. Mr. Gibson and I are also attorneys for Harry Pace in this case, also in the case in the Superior Court. I don't know what you mean by handling the deal at the Chicago Title and Trust Company in reference to 6140 Rhodes Avenue, because the

deal had to do with the purchasing and mortgage and all that sort of thing. I was the attorney who represented the Supreme Liberty Life Insurance Company in the making of a first mortgage on the property, which you call the Crook property. I think I brought a $4,400.00 check to the Chicago Title and Trust Company and deposited it in that escrow. If the escrow shows it, it is correct. I don't remember the escrow. I have about 150 each year. The $525.00, deposited by Mr. Basse, was not deposited while I was there. I don't know anything about it. I got the escrow number from somebody and was told to go and deposit my papers, together with the check for $4,400.00. Nobody else was there, so far as I remember. Here is the principal note. I think this is a correct copy of the principal note of Jay B. Crook and Hallie C. Crook, dated May 19, 1937, for $4,400.00, payable to bearer. It is the property of the Supreme Liberty Life Insurance Company. I prefer not to have the original note marked. Here is a copy of it. It looks like my writing, "Deliver to Earl B. Dickerson," on Plaintiffs' Exhibit 11, which is a trust deed from Jay B. Crook to Chicago Title [fol. 193] and Trust Company, document number 12,003,438. I did not record this trust deed. I did not get it from the Chicago Title and Trust Company. It was mailed to me. The trust deed was deposited with the Chicago Title and Trust Company pursuant to the terms of the escrow agreement which was just shown me. I never heard of the deed from the First National Bank of Englewood to Jay B. Crook, which is document number 12,003,437, before in my life. I don't know that I ever saw the deed from Englewood Bank to Crook in my whole life. It is just a coincidence. I said that the trust deed came to me in the mail. I did not say from Chicago Title and Trust Company. It was after it was recorded that it came to me. I have the Parrish note here for the loan on the Pace property, 413 East 60th Street. I know the number you have given as being where Mr. Pace lives. I have never been there in my life. I have in my hand the principal note for $3,500.00, executed April 22, 1937, by Edward E. Parrish and Aeolian H. Parrish. I have a copy of that note. I do not want the original marked as exhibit. I think that is my handwriting showing the words, "Mail to Henry Aloysius Lutz, 415 South Franklin Street, City," on Plaintiffs' Exhibit 15, the deed from Harrower to Lutz. It is possibly my writing that states, "Deliver to Edward E. Parrish, 59 Tenth Street,

New York City, New York," on Plaintiffs' Exhibit 16, which is the deed from Lutz to Parrish, document 11,983,901. I don't remember where I got the information as to where Parrish resided. No, I did not look after the distribution of the funds of the loan on the 6140 Rhodes Avenue property. I merely deposited at the Chicago Title and Trust [fol. 194] Company a check, payable to the Chicago Title and Trust Company for $4,400.00. I have met Mr. James Joseph Burke since this case was filed, never before. I heard of him and cursed him out a few times, but never saw him. I know Dr. James L. Hall socially, to say, "How do you do," to him. I have not known him long. I was in the Attorney General's office in 1936. I do not remember calling you up about the Burke vs. Kleinman case, because I never had anything to do with it, never knew anything about it until after it was decided. Dr. Hall looks colored to me.

(Witness excused.)

ARTHUR A. BASSE:

Direct examination.

I was sworn before and testified before. I don't think I deposited $525.00 in cash with the Chicago Title and Trust Company on escrow 106,146, evidenced by Plaintiffs' Exhibit 20. I closed the matter up there on the day the escrow was made, and subsequently certain other moneys were deposited, but not on the very day. That is what it says on the escrow sheet that I signed, but I think the $525.00 was deposited the next day, or the next afternoon. I am sorry, I don't know who deposited it.

(Witness excused.)

[fol. 195] CARL A. HANSBERRY:

Direct examination.

By Mr. Churan:

My full name is Carl A. Hansberry. I live at 5949 Michigan Avenue. I have lived there about four months. Prior to that I lived at 6140 Rhodes Avenue. I lived there about

six or seven months. I don't remember exactly the day I moved in, I think about the 25th or 26th or 27th. I don't remember if it were the day before I obtained the deed from Crook or not. I lived at 549 East 60th Street prior to living at 6140 Rhodes Avenue. I lived there about eight or ten months. Ruth Hoffman gave me permission to move in that apartment at 549 East 60th Street. She is a cousin of mine. She is a white woman. Yes, I know James Joseph Burke. I have known him about four, five, possibly six months. I did not know him before I got title to this property from Crook, had never seen him before.

(Witness excused.)

Plaintiffs offered in evidence Plaintiffs' Exhibit 27, the same being certified copy of the complaint and answers and the decree rendered on the second day of October, 1933, in the case of Burke vs. Kleiman, Superior Court No. 567687, in support of plaintiffs' replications and reply. Mr. Mollison objected on behalf of all the defendants to the admission in evidence of Plaintiffs' Exhibit 27 on the ground that the plea of res adjudicata was not averred in plaintiffs' complaint and was only referred to therein by way of showing notice to the defendants, and that the plea of res adjudicata was untimely raised and should be stricken from plaintiffs' reply.

[fol. 196] Plaintiffs offered in evidence Plaintiffs' Exhibit 28, 29, the same being a certified copy of Appellate Court Decision in the case of Burke vs. Kleiman, No. 567587, Superior Court Cook County.

Plaintiffs offered in evidence Plaintiffs' Exhibit 30, the same being a certified copy of Agreed Statement of Facts in the case of Burke vs. Kleiman, No. 567587, Superior Court Cook County.

The court reserved its decision in respect to the admissibility of the same in evidence.

The abstract of the contents of the foregoing exhibits appear in this abstract in the abstract of Plaintiffs' Joint Reply to the defendants' answers. (Abst. 58-69.)

JOSEPH P. SHEEDY, witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Churan:

My address is 3642 W. 60th Place. I am at present a night watchman for the Kane service and I was connected with the Woodlawn Property Owners' Association from October, 1927, to February 1, 1928. I examined books, Exhibit 5, and I was familiar with it. At the instance and request of the Chicago Real Estate Board I compiled the legal descriptions of the property in the Washington Park Race Track and the office of Selz and Southman and Mr. Helman (Sec.) recorded the documents. Documents referred to as 5A and 5B constitute the acknowledgments of notaries and that the said documents were recorded at the same time. The notaries that assisted me in taking acknowledgments were Fred L. Helman and Herbert James Davidson, Secre- [fol. 197] tary and Assistant Secretary respectively of the Woodlawn Property Owners' Association.

At this juncture, Mr. Churan offered in evidence Plaintiffs' Exhibit 5, together with the stamp of the recorder's endorsement recorded February 1, 1928, as Document No. 9914711, Book 25525 on Pages 5 to 31.

Mr. Mollison objected, Plaintiffs' Exhibit 5, was incompetent, immaterial and irrelevant, was without laying the proper foundation, and without proof that the owners of 95% of the frontage of the alleged restricted area signed Plaintiffs' Exhibit 5. Mr. Mollison continued that the plaintiffs failed to show total frontage of the area and failed to show that the owners of 95% of the total frontage of the area signed the agreement. Plaintiffs' Exhibit 5 does not contain any agreements by proper and lawful officers, the signatories have not been proved, that it is not an instrument as can be introduced under Section 34, of the Conveyance Act, it not appearing on its face to be a valid instrument.

Mr. Churan offered in evidence at this point plaintiffs' Exhibit 5A recorded as Document No. 9914713, and recorded February 1, 1928, in Book 25525, on pages 53 to 115 and Plaintiffs' Exhibit 5B recorded as Document No. 9914714 on February 1, 1928, in Book 25525 on pages 117 to 188 and

Plaintiffs' Exhibit 5C recorded February 1, 1928, as Document No. 9914712 in Book 25525 on pages 32 to 52, to these documents the same objection was made as was made to Plaintiffs' Exhibit 5.

Mr. Mollison continued that Plaintiffs' Exhibit 5 does not identify or describe the purported signatories, nor the par-
[fol. 198] ticular parcels of land purporting to be owned by the signatories and because the said instruments are unlawful, contradictory and unsettling to land title; that the purported signatories did not covenant and agree with each other, that offers for the making of the agreement were revoked by death, by withdrawal of offers, changes of ownerships and the lack of meeting of the minds of the alleged signatories at any definite time; that the purported signatories do not show in the case of corporations or trustees authority to sign or execute; that the Exhibit is not in the same condition as when signed; that the Plaintiffs' Exhibit 5 and the purported restrictions therein contained are unlawful, invalid and illegal and deprive white as well as colored persons of their rights and property without due process of law in violation of Sections 1, 2, and 20 of Article 2, of the Constitution of the State of Illinois, and likewise violate the 5th, 13th, and 14th Amendments to the Constitution of the United States of America; that Plaintiffs' Exhibit 5 provides for the use of the courts and public offices and officials for the creation and enforcement of the alleged restrictive agreement and the restrictions therein contained and thus deprive colored persons of equal protection of the law of the State of Illinois and as a consequence violate the 14th Amendment to the Constitution of the United States of America.

Plaintiffs' Exhibit 5 also violated public policy of the State of Illinois as shown by the Civil Rights Act and various other acts and statutes of the State of Illinois, prohibiting discriminations and inequalities on account of race, creed or color; that Plaintiffs' Exhibit 5 is against the public policy of the United States of America and in viola-
[fol. 199] tion of Sections 1977 and 1978 of the United States Revised Statutes; that the said agreement and restrictions are not covenants running with the land but merely restrictions against persons and races; that the restrictions are illegal and void because they purport to include as assenting signatories persons who did not sign the agreement, persons who had no power legally to give

assent thereto, persons who were under a legal disability to give assent thereto and as a consequence destroyed the freedom of contract of the persons who did not sign said agreement as well as the freedom of contract of the defendants in this case thus violating Section 2, of Article 2 of the Constitution of the State of Illinois and the 14th Amendment to the Constitution of the United States of America; that the restrictions are contradictory to the purposes, aims and objects as expressed in the preambles to the Constitution of the State of Illinois and the United States of America, as well as being against the general welfare of the State of Illinois and the United States of America; that the restrictions imposed in Plaintiffs' Exhibit 5, constitute an illegal restraint in the trade of land and property in the State of Illinois and the United States of America; because the restrictions imposed are unreasonable, discriminatory and unenforceable in a Court of Equity, because Plaintiffs' Exhibit 5, 5A, 5B, and 5C, are not concurrent or counterpart agreements or substantial similar agreements as provided for the Plaintiffs' Exhibit 5; Plaintiffs' Exhibit 5 is inadmissible under plaintiffs' pleadings; Plaintiffs' Exhibit 5A and 5B are separate documents and purport to contain acknowledgments of signatures to the foregoing instruments which said fore-[fol. 200] going instrument was recorded as Document No. 9914712 which consists of an arbitrary compilation of names and frontage feet; Plaintiffs' Exhibit 5B is inadmissible to the foregoing instrument which it purported to acknowledge was Plaintiffs' Exhibit 5A, recorded as Document No. 9914713, which said document is in a deed of conveyance; Plaintiffs' Exhibit 5, 5A, 5B and 5C are inadmissible because the acknowledgments purporting to be taken were by officers and interested parties in the Woodlawn Property Owners' Association, an organization which under the pleadings has an interest in the subject matter; Plaintiffs' Exhibit 5, is inadmissible as against the defendants' Supreme Liberty Life Insurance Company because of the language on its face stating that the lien or no mortgage shall be impaired or invalidated and further that Plaintiffs' Exhibit 5 is inadmissible as against the defendant, Harry Pace, for the reason that he is joint in the action as an officer of the Supreme Liberty Life Insurance Company.

That the instrument is inadmissible as to the defendant Burke for the reason that he is not a party signatory but a

real estate broker executing the duties of his profession; Plaintiffs' Exhibit 5, is inadmissible as to the defendant Katz, for the reason that no proper foundation has been laid with reference to him.

Mr. Dickerson reserved the right to argue on the points raised by Mr. Mollison specifically.

Mr. Stradford objected on behalf of the defendant Hansberry that Eva Somerman did not acknowledge her signature to the alleged agreement.

Plaintiffs' Exhibit 5, 5A, 5B and 5C are marked for [fol. 201] identification and received in evidence as Plaintiffs' Exhibit 5, 5A, 5B and 5C.

Mr. Joseph B. Sheedy:

Cross-examination.

By Mr. Stradford:

I spent most of my time calling on property owners and usually was sent by myself and sometimes Reverend Father Gilmartin and the Jewish Rabbi went with me. I had a sample copy that the Chicago Real Estate Board gave me to take along with big print "Compiled by the Chicago Real Estate Board and Endorsed by ———" and I showed the persons this document. I showed each property owner according to the legal description I got from Selz and Southman's office. I told the people the agreement and that the neighbors agreed among themselves not to rent, sell or lease to any one but those of a Caucasian race, I showed them the signatures and asked them to sign. I didn't know the parties before I went there.

Plaintiff rests.

Mr. Herman Schroeder, on behalf of the defendants, being first duly sworn, testified as follows, on March 15, 1938:

I live at 3015 North Avers Avenue.

Mr. Shannon: In order to expedite matters, I want to make a general objection such as the other side did and have it carried through without my having to repeat it each time. That as to the defendants, Israel Katz, Carl A. Hans-

berry, Nannie L. Hansberry, Jay B. Crook, Hallie C. Crook, [fol. 202] James Joseph Burke and Harry H. Pace, each of whom are shown by the record to have either signed the restrictive agreement introduced in evidence as Plaintiff's Exhibits 5, 5-A, 5-B and 5-C, or are persons in privity of estate as grantees, either direct or remote, of persons who had signed the agreement, we object to them or any documentary evidence which seeks to attack the validity of that agreement, as being estopped by reason of being the grantees, and in privity of estate.

Then as to all of the defendants, we object to any testimony by them or on their behalf which in any way seeks to attack or deny the execution, the delivery, the existence, the compliance with the conditions precedent and the enforceability of the restrictive agreement admitted in evidence, because of the estoppel by verdict against each and all of the defendants by reason of res judicata through the judgment and the decree of the Superior Court of Cook County, Illinois, entered in the cause of Burke v. Kleiman et al., Gen. No. 567687, entered on October 7, 1933, being a class suit, which decree was also affirmed by the Appellate Court, for the First District, on November 27, 1934, case No. 37522, entitled there Burke v. Kleiman, et al.

The Court: I think that is very satisfactory.

(Examination of Mr. Schroeder continued by Mr. Dickerson.)

I am a draftsman employed by the City of Chicago in the City Map Department, under the supervision of Howard G. Boardman, Superintendent of Maps, who was also custo- [fol. 203] dian of the maps and plats of the City of Chicago. We have at our office copies of maps and plats of lots in the City of Chicago showing the dimensions by feet and inches of the lots. These copies are made in our office from the record plats. I have the maps covering one or the other side of Evans, Langley, Champlain, St. Lawrence, Rhodes, Eberhart, Vernon and South Park Avenues, between 60th and 63rd Street and on 60th, 61st, and 62nd Streets between South Park and Cottage Grove Avenue, which shows the dimensions of the lots in feet and parts of feet.

(Defendants' Exhibits 1, 2, 3 and 4, maps marked for identification.)

After a colloquy between the witness, Mr. Dickerson, Mr. Shannon and Mr. Churan about the method of tracing used by the office of the Map Department in preparing defendant's exhibits marked for identification 1, 2, 3 and 4.

The witness WALLACE R. ANTHON, on behalf of the defendants, being first duly sworn, testified as follows on direct examination by Mr. Dickerson:

My name is Wallace R. Anthon and I live at 1458 W. Berwyn Avenue, Chicago. I am a map engineering draftsman in charge of City Map Department in the office of the maps and plats. My duties are to supervise the preparation of maps, blue-prints, plats and tracings. I have examined Defendant's Exhibit 1, for identification purporting to be a plat covering among other sections, the Washington Park Subdivision and state that it has been a part of the permanent records of our office for the 15 years I have been there. [fol. 204] Defendant's Exhibit 1, for identification is a reproduction from a tracing made in the legal course of business in our office. The tracing is made from original drawings which is a compilation of various subdivisions as recorded in the Office of the Recorder of Deeds of Cook County. A tracing is made and checked and a reproduction is made. I know that Defendant's Exhibit 1, for identification is a true and correct reproduction.

Defendant's Exhibit 2 for identification is a blue print of the East half of the Southeast quarter of Section 15, Township 30, North range 14, comprising exactly 80 acres of land running from 59th to 63rd Streets and from St. Lawrence to South Park Avenue, showing the same things as Defendant's Exhibit 2 for identification.

Defendant's Exhibit 3 is a blue print of the West Half of the Southeast Quarter of Section 15, 38, 14, running from 59th to 63rd, and from St. Lawrence to South Park, showing the subdivisions as recorded, public alleys, streets and dimensions of various lots.

Defendant's Exhibit 4 for identification is a blue print of the East half of the Southwest quarter, including the streets from 59th to 63rd and South Park to Indiana Avenue. Defendant's Exhibits 2, 3 and 4 for identification are reproductions from the original tracing in our office, which tracing is under my supervision and control. They are true and correct reproductions. Some of the portions of the areas I

mentioned are made up from file records by our reproductions and are as correct and close as anybody could get them. All of our tracings were taken from the recorded original plats in the Office of the Recorder of Deeds. These [fol. 205] tracings were made from a drawing that was in turn made from a compilation of recorded subdivision plats. These particular ones were not made under my personal supervision, this blue print was. I checked the original tracings before having these blue prints made. The tracings are checked as to accuracy against the best original data that we have.

(Defendant's Exhibits 1, 2, 3 and 4 for identification were then offered and received in evidence and marked Defendant's Exhibits 1, 2, 3 and 4.)

Plaintiff's Exhibit 5 for identification is an enlargement of the areas covered in Defendant's Exhibits 1, 2, 3 and 4. I supervised the preparation by feet in the area set out in the maps described as Defendant's Exhibits 2, 3 and 4, covering the property specifically on the east and west sides of South Parkway from 60th to 63rd Streets and further that the frontage of the west side of South Parkway from 60th to 63rd is 1,851.49 feet and that frontage on the east side of South Parkway is 1,762.61. The computation of the frontage for the west side of Vernon Avenue from 60th to 63rd Street and the east side of Vernon Avenue between the same streets, I found to be the same, namely, 1,763.07 feet for each side of the street. The computation of the frontage on west and east side of Eberhart Avenue between 60th and 63rd Streets, I found to be 1,762.98 feet from each side of the street. The west side of Rhodes Avenue between the same streets 1,744.89. The west side of St. Lawrence Avenue between 60th and 63rd and the east side of Langley, both having the same dimensions, namely, 1,776.30 front feet. The west side of Evans between 61st and 63rd [fol. 206] and the east side of Evans, each having 1,179.10 front feet. The south side of 60th street from South Park Avenue to Cottage Grove Avenue has 2,182.21 front feet. The north side of 61st Street between South Park and Cottage Grove Avenues has 2,124.47 front feet, while the south side has 1,962.52 front feet. All of the streets referred to in my computation covering the same area as set out in Plaintiff's Exhibit 5. All of the dimensions referred to are exclusive of streets and alleys.

The total frontage of the area is 37,264.18 front feet exclusive of streets and alleys. Five per cent of the total number of front feet is 1,863.21 front feet. 95 per cent of the total frontage in the area is 35,400.97 front feet, exclusive of streets and alleys. Defendant's Exhibit 6 for identification is a computation of the figures I have just testified to.

(Defendant's Exhibit No. 6 for identification was offered and received in evidence and marked Defendant's Exhibit 6.)

Cross-examination.

By Mr. Churan:

I only included the frontage specified in Plaintiffs' Exhibit 5. I included everything within the exhibit as described. Our records included all the physical land layout.

Mr. Churan: Does the compilation include the churches?
The Court: He says he did.
The Court: It may stand.

[fol. 207] WALLACE R. ANTHON, recalled, a witness on behalf of the defendant, having been previously duly sworn, testified as follows:

Redirect examination.

By Mr. Dickerson:

I stated on the witness stand that an assistant in my office prepared the calculations described in Defendants' Exhibit 6. I have the assistant here and his name is Joseph DeVorak.

JOSEPH DEVORAK, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dickerson:

My name is Joseph DeVorak. I live at 8728 South Ellis Avenue and I am employed as a map engineer and draftsman in the Bureau of Maps under the supervision of Mr.

Anthon. I made the calculations contained in Defendants' Exhibit No. 6 covering the streets specifically described therein. I have seen Defendants' Exhibits 2, 3 and 4, and know that they are reproductions of Defendants' Exhibit No. 1 for identification. I know the computations are correct, because I checked them mathematically. I graduated from the University of Illinois in 1920 and have been employed since that time in various architectural offices and with the City of Chicago. I am familiar with mathematical and arithmetic computations. I know that the figures are all correct.

Mr. Dickerson: I would like the record to show that the Defendants' Exhibit No. 1 for identification is not offered for evidence, because it is one of the permanent records [fol. 208] belonging to the Map Department of the City of Chicago.

Truman K. Gibson, Jr., being first duly sworn, testified as follows for the defendants:

Direct examination.

By Mr. Dickerson:

I live at 420 E. 60th Street and I am a lawyer practicing at 180 W. Washington Street. I graduated from the University of Chicago in 1933 with the Degree of Bachelor of Philosophy and in 1935 with the Degree of Bachelor of Law. For five years, I was research director under Dr. Harold S. Gosnell of the Political Science Department at the University of Chicago. During that time I aided in the study that involved the preparation of statistical tables. I also worked for the Supreme Liberty Life Insurance Company in the Statistical Department. Since my admission to the bar in 1935, I have had occasion to examine titles to real estate and I am familiar with the books, records, indices, tract books, maps and plats and other documents required by law to be kept and which are kept in the Office of the Recorder of Deeds of Cook County. Plaintiffs' Exhibit 5-C which I have seen before, purported to be computation of the parcels numbers, streets, addresses, legal descriptions for purported owners of the lots indicated by legal description and by street addresses which purported front-

age feet listed for each lot. I have compiled the total frontage as appears in Plaintiffs' Exhibit 5-C and find that it set out 20,163.22 front feet as having been signed for. I prepared this total with the use of an adding machine. I computed the percentage of the total frontage allegedly [fol. 209] signed for in Plaintiffs' Exhibit 5-C with the total frontage as set out in Defendants' Exhibit 6, and find that the area for which the plaintiffs' claim signatures amounts to 54.2 per cent of the total frontage in the area namely 37,264.18 front feet.

W. Ellis Stewart, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dickerson:

My name is W. Ellis Stewart. I live at 4524 South Parkway and I am secretary of the Supreme Liberty Life Insurance Company, one of the defendants in this case and have held that office since 1921. The Supreme Liberty Life Insurance Company is an old line legal reserve life insurance company organized under the laws of the State of Illinois, with a capitalization of $100,000 and with $36,300,000 worth of outstanding business. There are approximately 140,000 policy holders located in 12 states. My duties as secretary of the Insurance Company include the recordation of the minutes of the meetings of stockholders, the Board of Directors and the minutes of the various committees. I have the book in which the minutes of the meetings of the Board of Directors are kept. This book shows under the By-Laws of May 28, 1929, adopted at a time when I was secretary and recorded by me, the Executive Committee of the Supreme Liberty Life Insurance Company, in Section 1, was stated to consist of the Chairman of the Board, President, 1st Vice-President, General Counsel, Secretary-Treasurer and Agency Officer. All action of the Committee, it was [fol. 210] therein stated, was to be reported in writing to the Board of Directors at its meeting next succeeding such action, and in Section 2 of Article 3, the By-Laws, it is provided that an Executive Committee shall possess all the books of the Board of Directors during the intervals be-

tween meetings of the said Board. The members of the Executive Committee at the present time are Truman K. Gibson, Sr., Chairman of the Board, Harry H. Pace, President, Median O. Bousfield, Vice-President, Earl B. Dickerson, General Counsel, W. Ellis Stewart, Secretary and J. G. Ish, Jr., Agency Officer. Defendants' Exhibit No. 7 for identification, which I now examine is a photostatic copy of the By-Laws of the Company beginning with Article 3, Sections 1, 2, 3, 4 and 5.

(Defendants' Exhibit 7 for identification offered and received in evidence as Defendants' Exhibit No. 7.)

I have the minutes of the meetings of the Executive Committee and referring to the minutes, I find that on April 15, 1937, the following persons were present at that meeting, Harry H. Pace, T. K. Gibson, Sr., J. G. Ish, Jr. and Earl B. Dickerson. It appears in the minutes that I personally took at that meeting that a motion was made by Mr. Dickerson and seconded by Mr. Stewart that the application of Ward E. Parrish of New York City for a loan of $3,500.00 on property located at 413 E. 60th Street be granted; the same to be repaid at the rate of $35.00, per month beginning June 1, 1937, including interest at the rate of 5½- per annum, the motion was carried.

Defendants' Exhibit No. 8 for identification I now ex-
[fol. 211] amine is a photostatic copy of the entire minutes of the meetings of the Executive Committee of the Supreme Liberty Life Insurance Company as of April 15, 1937, and find that there were other mortgage applications considered at that meeting. I see an application for $500.00 on property at 3245 Vernon Avenue; another for a loan of $1,500 on property at 422 Houston Street, Atlanta, Georgia.

Mr. Churan: What is the use? It is immaterial.

Mr. Dickerson: Obsolutely pertinent they relate to the nature of the transaction. This was an ordinary transaction along with countless other transactions of a similar nature.

(Mr. Stewart continues): There was an application for a loan of $3,500 on the premises at 5942 Indiana Avenue.

(Defendants' Exhibit No. 8 for identification offered and received in evidence as Defendants' Exhibit No. 8.)

The treasurer of the company, Mr. Gibson, brought in the application of the Parrish mortgage. I have the proceedings of the meeting of the Executive Committee held on or about May 12, 1937, and find that there was present at that meeting Harry H. Pace, T. K. Gibson, Sr., Earl B. Dickerson and W. Ellis Stewart. We considered at that meeting, application for a loan to be secured by the premises at 6140 Rhodes Avenue, the loan of $4,400 was granted to be repaid in monthly installments of $40 with interest at 6 per cent per annum, payable monthly. A loan was also made to Jay B. Crook. We considered other applications for mortgages at that meeting. I have examined [fol. 212] Defendants' Exhibit No. 9 for identification and it is a photostatic copy of the minutes of the Executive Committee held on Wednesday, May 12, 1937.

(Defendants' Exhibit No. 9 offered and received in evidence as Defendant's Exhibit No. 9.)

During the meeting of the Executive Committee, I had no personal knowledge of any alleged restrictive covenants on the premises described in any applications. As for the property located at 413 East 60th Street, it was only five or six doors west of the building where the treasurer, T. K. Gibson, Sr., lives. There are no other colored people in that block.

Cross-examination.

By Mr. Churan:

I saw these properties after the loans were approved.

Redirect examination.

By Mr. Dickerson.

At the time of the application for a mortgage loan, I did not know anything about any purchase of property, nor did I know anything about any interest that Mr. Pace, the President of the Company, acquired subsequently, had in the property. I knew nothing about the occupancy of the property that was security for the Crook loan.

T. K. GIBSON, SR., called as a witness on behalf of the defendants, March 15, 1938, being first duly sworn, testified as follows:

I live at 420 East 60th Street. I am chairman of the Board, treasurer of the Supreme Liberty Life Insurance [fol. 213] Company, one of the defendants in this case. I have been in the insurance business since 1910. I was graduated from Atlanta University and Harvard College in 1908. I was manager of the Atlanta Life Insurance Company of Atlanta, Georgia, from 1910 to 1919 and was organizer and founder of the Supreme Life and Casualty Company of Ohio from 1919 to 1928. In 1929, I aided in the merger of the Liberty Life Insurance Company of Illinois, the Northeastern Life Insurance Company of Newark, New Jersey, and the Supreme Liberty and Casualty Company of Ohio. As the treasurer of the company, I am custodian of the funds, custodian of the properties, mortgages, securities, stocks, bonds and all the assets of the company. I look after the rents and the mortgage applications. Mortgage applications are usually made to my office following which a survey is made to see whether or not the value will hold up and then an application is submitted to the Executive Committee and approved and if approved is then turned over to counsel for drawing up necessary papers. During the year 1937, we made about $144,000 worth of mortgages constituting a total of about 40 mortgages. The mortgages are usually repaid at the rate of 1 per cent per month and the interest is from 5½ to 6 per cent. The total assets of the Insurance Company as of December 31, 1937, were about $2,000,000 with about $288,000 of that amount in mortgages. In April, 1937, the mortgage application was made covering the property at 413 East 60th Street, Chicago, Illinois. The application was made by E. E. Parrish and he was employed in some sort of clerical position in the East. The application was for $3,500 and in my personal check-up, I estimated the [fol. 214] property to be worth $7,000,000. I have seen the property every day for a period of about five years. I live only a few doors from this property with my family. I live in a three-flat building, the other flats which are occupied by colored. I am familiar with the occupancy of the premises on 60th Street, east from South Parkway

to Vernon Avenue. Colored people live in the large part of the building on the corner, the address of the building being 403-405-407-409 East 60th Street. Two elderly white ladies live in 411, Mr. Pace lives in 413, white lives in 415 and 417, I live in 423 East 60th Street and colored live in the large 24-apartment building next door to me on the corner of Vernon. The application, I have referred to as the Parrish application was submitted to the Executive Committee and approved by them for $3,500. Since the making of the mortgage payments have been made regularly. My secretary, Inez V. Cantey, keeps the records as bookkeeper and clerk of the mortgage register. She works under my supervision. Two appraisers made appraisals pursuant to the insurance laws of Illinois. There was no discussion or controversy relative to the sale or purchase of the property, or with respect to the occupancy of the property. Mortgage application for 6140 Rhodes was made by Jay B. Crook. I didn't know Mr. Crook prior to the application. The loan on the premises was approved for $4,400. I personally examined the property. There was no discussion in the Executive Committee meeting relative to the occupancy of the premises. I have been making first mortgage loans on property since 1910 and have looked over and appraised property in many states. [fol. 215] I am familiar with the ordinary reasonable values of real estate. At the time I looked over both the properties in question, it was my judgment that they were both worth at least twice the amount of the mortgages. I have had experience in the field of construction and remodeling of building. I never, as a representative of the Insurance Company, had any dealings with James Joseph Burke, one of the defendants in this case. I never at any time talked with Mr. Burke relative to any matters affecting the mortgage. At the time the applications were made, I did not know that Mr. Burke had any interest in the sale of the properties. I never at any time, as the treasurer or chairman of the Insurance Company had any dealings with the First National Bank of Englewood at all. I did not have any dealings with the bank in connection with the purchase of 6140 Rhodes Avenue, nor did I ever have any dealings with the Johnson Realty Company.

Cross-examination.

By Mr. Churan:

I did not know of any restrictive agreements in the Washington Park Subdivision. The mortgages made were just one of several that were made during the year. I did not know when the deed of Parrish was recorded. I left all legal matters to counsel for the Insurance Company, Mr. Earl B. Dickerson. I do not recall to whom the check for $3,500 loan was made out to. I considered the property on 60th to be worth $7,000. I did not see any deed and did not know what the consideration for the property was. I did not know Mr. Hansberry. He was in the building at 6140 Rhodes twice.

[fol. 216] Redirect Examination.

By Mr. Dickerson:

When I went into the building at 413 East 60th Street, I saw a sign in the basement advertising the property for sale for $10,000.00. In my experience, I found that deficiency decrees in mortgage foreclosures are very rarely collected so that I regarded the property as the just security for a mortgage loan. When I went out to look at these properties I knew that other appraisals would be made later.

Inez V. Cantey, called as a witness on behalf of the defendants, being first duly sworn testified as follows on March 15:

Direct examination.

By Mr. Dickerson:

My name is Inez V. Cantey and I live at 4213 Vincennes Avenue, City of Chicago. I am a graduate of Atlanta University. I am a bookkeeper and clerk in the Investment Department of the Supreme Liberty Life Insurance Company under Mr. T. K. Gibson, Sr., the treasurer. I have been employed by the Supreme Liberty Life Insurance Company since April 14, 1936, and since that time have been

keeping a record of all loans or mortgages made both secured and unsecured, and the record of all bonds furnished. I keep that record in a mortgage register. I make the entries in the register in my own handwriting. When an application is approved by the Executive Committee, Mr. Gibson gives me a record of it and I enter the name of the mortgagor and give the loan a number. After the loan is consummated and the different instruments are given [fol. 217] to me, I make the entry in the book. Mr. Earl B. Dickerson, the attorney, prepares and transmits the papers to me. During the year 1937, approximately 40 mortgages were made by the Insurance Company. Eight mortgages were made between January, 1937 and the first of June, 1937. From June 1, 1937, through December 27, 1937, about 32 mortgages were made, the highest mortgage made during the period was $6,000.00 and the lowest was for $654.00. My mortgage register shows with respect to the loan made by the Supreme Liberty Life Insurance Company, the name of Edward E. Parrish, $35.00 on June 1, 1937; on July 6, 1937, $35.00; $35.00 on August 3, 1937; $35.00 on September 1, 1937; $35.00 on October 1, 1937; $35.00 on November 1, 1937; $35.00 on December 1, 1937; on December 27, 1937; $35.00 on February 3, 1938, and $35.00 on March 2, 1938. Defendants' Exhibit No. 10, which I now examine, is a photostatic copy of the ledger sheet of the mortgage record of the Edward E. Parrish mortgage.

(Defendants' Exhibit No. 10 for identification admitted in evidence as Defendants' Exhibit No. 10.) I have a record of appraisals made on the property located at 413 East 60th Street. Those appraisals were for $8,000.00. The two appraisals were made by H. L. Thompson and Julian A. Black. I have a record of the mortgage owned by the company in the name of J. B. Crook on the property at 6140 Rhodes Avenue. I made the original ledger entries on this mortgage and find payments made on July 2, for $40.00, 1937, October 4, 1937, $40.00; December 11, $176.01. The Supreme Liberty Life Insurance Company is still the owner of the two mortgages. Defendants' Exhibit 11 for identi-
[fol. 218] fication I now examine is a photostatic copy of the ledger sheet on the property at 6140 Rhodes Avenue. The appraisals on this property were made by H. L. Thompson and Julian A. Black to the amount of $9,000.00 each. Said document so offered and received in evidence, was marked Defendants' Exhibit No. 11.

Cross-examination.

By Charles A. Churan:

TRUMAN K. GIBSON, JR., having been previously sworn took the stand and testified further for the defendants.

Direct examination.

By Mr. Dickerson:

I examined plaintiff's Exhibits 5, 5A, 5B and 5C and examined them in the Office of the Recorder of Deeds and Documents No. 9914711—9914712—9914713—9914714. While examining these documents, I prepared notes and also prepared a list of the purported signatures appearing attached to Document 9914711 and also a list of the purported notarized signatures on Documents 9914712—9914713—9914714. Then I prepared a map of the purported restricted area. I examined the record title and entered the name of the owner of each lot on the maps I had prepared. (Defendant's Exhibit 12, for identification which I now examine is a series of maps showing the lots in each block in the purported restricted area together with the names of the owners of record as of February 1, 1928. I prepared defendant's Exhibit No. 12 for identification. I then checked record title holder of each lot with the names of the pur- [fol. 219] ported signatories to plaintiff's Exhibits 5, 5A, 5B and 5C. I made this check for the purpose of ascertaining the record title holders who as of February 1, 1928, had purportedly signed plaintiff's Exhibit 5, 5A, 5B and 5C. I made this check for the purpose of ascertaining the record title holders who as of February 1, 1928, had purportedly signed plaintiff's Exhibit No. 5. I shaded plaintiff's Exhibit 12 to correspond with the facts. I colored the lots blue and indicated that the purported signatory was the same as the record title holder of February 1, 1928. The black shaded areas indicate lots for which there were signatures but the signatures were appended by persons other than the record title holders. The green shaded areas are lots for which groups purportedly signed the agreement, the red shaded areas are those lots for which no purported signatures appeared attached to plaintiff's Exhibit 5. I compared the maps set out in defendant's Exhibit 12 for identification with defendant's Exhibits 2, 3, and 4 and found areas to be true and correct. There were no changes in ownership on these so-called doubtful or shaded areas of

the property prepared upon by my examination of the records between February 1, 1928 and September 30, 1937. Those are the only areas I checked as of September 30, 1937. The blue colored areas indicate those areas for which the purported signatures appear attached to plaintiff's Exhibit No. 5 and the record title holders for the said lots are the same comprising 24886.33 front feet, the black shaded or debatable area, where all the record title holders did not sign plaintiff's Exhibit No. 5, amounts to 2,495.91 front feet. The green shaded areas are those areas signed for by [fol. 220] groups comprising 3,501.14 front feet. Areas in red refer to as unsigned are a part of the description set forth in Plaintiffs' Exhibit 5. Defendants' Exhibit No. 12 for identification offered and admitted in evidence as defendants' Exhibit No. 12 for identification is a separated series of maps or drawings showing those areas for which no purported signatures appeared in plaintiff's Exhibit 5. In other words it is just a pictorial representation for those lots for which there were no signatures. I have computed the percentages of the unsigned areas comprising the total frontage in areas as set out in defendant's Exhibit No. 6 and find that the 6,496.03 feet is 17.4% of 37,264.18 feet the total frontage in the area.

Defendant's Exhibit No. 14 for identification which I now examine is a compilation of the black shaded areas that I prepared, examined and compared with the areas described in plaintiff's Exhibit No. 5. I find that area is 37,264.18 feet.

Defendants' Exhibit 13 and 14 received in evidence as defendant's Exhibit No. 13 and 14.

Thursday, March 17, 1938

Mr. Dickerson. I would like the record to show that we served subpoena on Isaac Kleiman and James Lowell Hall requesting that they personally appear March 17, 1938, at 10 a. m. to testify.

[fol. 221] Truman K. Gibson, Jr., witness for the defendant previously called resumed the stand and testified further:

Since my last testimony on March 15, I have examined the records of the Recorder's Office with respect to prop-

erties listed as shaded and doubtful in defendant's Exhibit 14. In each individual case, I took each property listed in defendant's Exhibit 14, ascertained the purported signatories and plaintiff's Exhibit 5C and examined the Book of Records and also the track books in the Office of the Recorder of Deeds, Cook County to ascertain the true owner of each of the properties listed. In my examination, I found the following: The property described as Block 7, Lot 17, North 30 feet, in re-subdivision of Washington Park Subdivision of Chicago, 6137 St. Lawrence Avenue. The name of the purported signature in plaintiff's Exhibit 5C was James C. Bailey, Jr.; the documents in the Office of the Recorder of Deeds indicated the recorded owner as of February 1, 1928, was Willard S. Bailey, who obtained title by a warranty deed in Document No. 6096738, the Book of Records 14,497 on Page 42, E. J. and Oliver Welch, grantor. I have a long list of similar cases and I will state the first address, legal description, the name of the record title holder in each case.

6020 St. Lawrence Avenue

Block 13, Lot 6, MacChesney's Subdivision of the East Half of Lots 12 and 13.

Name of record title holder: Mary Haggerty.

[fol. 222] The name of the person who purported to sign Plaintiff's Exhibit 5 and listed on Plaintiffs' Exhibit 5C: Mary G. Averitt.

Mary Haggerty obtained title by warranty deed in 1911 from Nathan and Leva Mackson, document No. 4,880,436, book of records 11,727 at page 363.

6137 St. Lawrence Avenue

Block 7, Lot 17 north 30 feet, in Re-subdivision Washington Club Addition to Chicago.

Name of record title holder: Willard S. Bailey, who obtained title by warranty deed in 1917, in document No. 6,096,738, book of records 14,497, page 42.

Plaintiffs' Exhibit 5 purporting to be signed by James G. Bailey, who is listed also in Plaintiffs' Exhibit 5C. This search was made as of February 1, 1928, and checked as of September 30, 1927, there being no change or changes between these dates.

6214 Evans Avenue

Block 4, Lot 3, South 30 feet in Re-subdivision of Washington Park Club Addition to Chicago.

The names of the record title holders as of February 1, 1928, and September 30, 1927, are Eva Black and Frank Vogel, jointly, by warranty deed in February, 1927, from Fritz Bethig, in document No. 9,559,511, in Book of Records 24,078, at page 362.

Eva Black purported to sign Plaintiff's Exhibit 5, and is listed in Plaintiffs' Exhibit 5C.

[fol. 223] 6150 Rhodes Avenue

Block 2, Lot 23, in Re-subdivision of Lots 11 and 12 in Re-subdivision of Washington Park Club Addition to Chicago.

Honoria Brazil obtained title by warranty deed in 1910 from Thomas A. Collins and Catherine Collins, his wife.

Document No. 4,545,649, recorded in book of records 10,-984, at page 99.

John Brazil (Mrs. John) purported to sign Plaintiffs' Exhibit 5.

6216 Evans Avenue

Block 4, Lot 4, North Half, in Re-subdivision of Washington Park Club Addition to Chicago.

Kathleen F. Callaghan obtained title by quit-claim in 1917 recorded as document No. 69,097 Torrens System.

Martin Callaghan purported to sign Plaintiffs' Exhibit 5 and is listed in Plaintiffs' Exhibit 5C.

6201-05 Champlain Avenue

Block 6, Lots 27, North 3.45 feet, and 28, all in Re-subdivision of Washington Park Club Addition to Chicago. The parties in title are Nora Carroll, Kate Burns and Michael Burns, obtaining title in 1923 by warranty deed from Amelia Samson and Caesar Samson, in Book of Records 19,143, at page 245.

Nora A. Carroll purported to sign Plaintiffs' Exhibit 5 and is listed in Plaintiff's Exhibit 5C as having signed.

[fol. 224] 6038-42 Vernon Avenue

Block 1, Lot 35, North 2 inches and Lots 36 and 37 in J. J. Mitchell's South Park Subdivision of Blocks 9, 10 and 11.

The parties in title are Ernis E. Feeney and wife Agnes M. Feeney, jointly, by warranty deed in 1925, V. and P. Tamasauckas, grantors, in document number 8,989,953, in Book of Records 21,707, at page 584.

Anna Dandurand purported to sign Plaintiff's Exhibit 5, and is listed in Plaintiff's Exhibit 5C as having signed.

6128 Eberhart Avenue

Block 3, Lot 31, in Re-subdivision of Blocks 11 and 12 in Re-subdivision of Washington Park Club Addition to Chicago.

The party in title is Mary Drumm, by warranty deed in 1914 from Walter A. and Jennie Hanley.

Document No. 5,357,993, in Book of Records 12,766 at page 478.

The party purporting to sign Plaintiffs' Exhibit 5 and listed in Plaintiffs' Exhibit 5C as having signed is Michael Drumm.

6055-59 Eberhart Avenue

Party in title is Dorothy Eisenberg, a spinster, who obtained title by warranty deed in 1927 from Louis Pritckin and A. Pritckin, his wife, and Morris H. and Bella Goldstean, his wife.

Document 9,516,874, book of records 23,978, page 299.

[fol. 225] Jacob Eisenberg purported to sign Plaintiffs' Exhibit 5 and is listed in Plaintiffs' Exhibit 5C as having signed.

6100-6114 South Parkway

Lot 5, East 27 feet, Lot 6, East 72 feet, Lot 7, East 140 feet, except point at west end, in Snow & Dickinson's Subdivision of Lots 5 and 9.

The parties in title are the heirs of Thomas E. Wells, deceased.

Document No. 6,863,811, executed in 1927, is the assignment of a long term lease to Cornelius H. Farland, and Cornelius H. Farland purported to sign Plaintiffs' Exhibit 5 and is listed in Plaintiffs' Exhibit 5C as having signed.

6031 Vernon Avenue

Lot 16 in Block 2 in J. J. Mitchell's South Park Subdivision.

John Gamble is the party in title. He obtained title by warranty deed in 1910 from Nellie and Michael Egan.

Recorded as document 4,532,446, Book of Records 10,688, page 248.

Theresa Gamble purported to sign Plaintiffs' Exhibit 5 and is listed in Plaintiffs' Exhibit 5C.

6134 St. Lawrence Avenue

Lots 7, South 20 feet, and 8, North 10 feet thereof, in Block 9 in Resubdivision of Washington Park Club Addition to Chicago.

The parties in title are Catherine A. Gavin, Mary A. Gavin, Thomas W. Gavin, Helen C. Gavin and Claire G. [fol. 226] Gavin, jointly, by special warranty deed in 1927 from Ruth D. Wentsel.

Document 9,614,880, Book of Records 24,309, at page 269.

Patrick Gavin and Catherine Gavin purported to sign Plaintiffs' Exhibit 5 and are listed as having signed in Plaintiffs' Exhibit 5C.

6237-45 South Parkway

Lots 8 and 9 in Block 14 in Re-subdivision of Washington Park Club Addition to Chicago.

The name of the record title holder: Greenebaum Sons Bank & Trust Company.

Herbert Buchsbaum and Iram, his wife, conveyed by deed in trust, January 15, 1926.

Document No. 9,155,745, Book of Records 22,293, page 339.

Victor Hasterlik purported to sign Plaintiffs' Exhibit 5 and is listed in Plaintiffs' Exhibit 5C as having signed.

6120 Rhodes Avenue

Lot 34 in Block 2 in Re-subdivision of Blocks 11 and 12 in Re-subdivision of Washington Park Club Addition to Chicago.

The name of the record title holder: Louise Healey, by warranty deed in 1915, April 5th, from John W. Lyons.

Document No. 5,610,086, recorded in Book of Records 13,217, at page 536.

Name of party purporting to sign Plaintiffs' Exhibit 5 and listed in Plaintiffs' Exhibit 5C as having signed is John F. Healey.

[fol. 227] 6046 Vernon Avenue

Lot 33 in Block 1 in J. J. Mitchell's South Park Subdivision.

The names of the record title holders: Sarah Oliver Hill, James Edward Hill, Annie Hill Rogers and Maude Hill Warner, by quit-claim deed, July 18, 1925, from James P. Harrold.

Document 8,982,338, Book of Records 20,309, at page 223.

The name of the purported signatory to Plaintiffs' Exhibit 5 and the person listed in Plaintiffs' Exhibit 5C; Sarah O. Hill.

432-436 East 63rd Street

Lots 15 and 17 in Block 6 in Resubdivision of Blocks 11 and 12 in Resubdivision of Washington Park Club Addition to Chicago.

The names of the record title holders: Chester A. Shaeffer and wife, Elizabeth C. Sheaffer, jointly, by warranty deed August 21, 1922, from David Cold and Annie Cold, his wife.

Document 7,621,460, Book of Records 17,833, page 514.

Plaintiff's Exhibit 5 bears the purported signature of Johnson, for Grieg and Johnson.

6228 Eberhart Avenue

Lot 31, Block 5, in Resubdivision of Washington Park Club Addition to Chicago.

Name of record title holder: Nannie A. Johnson, who obtained title by quit claim deed, June 21, 1917, from Hattie Warr.

[fol. 228] Document No. 6,147,368, recorded in Book of Records 14,536, at page 246.

Plaintiffs' Exhibit 5 purporting to have been signed by John F. Johnson.

6219 Eberhart Avenue

Lot 6, South 13 feet, Lot 7, North 16 feet, in Block 7, in Re-subdivision of Blocks 11 and 12, Re-subdivision of Washington Park Club Addition to Chicago.

Names of record title holders: William Standinger and Lottie Lammel, his sister, jointly, who obtained title by warranty deed in April, 1927, from William H. and Elma Schelley.

Document No. 9,603,302, Book of Records 24,180, page 248.

Plaintiffs' Exhibit 5 was purported to have been signed by Lottie Lammel and M. L. Lammel, and they are both listed in Plaintiffs' Exhibit 5C as having signed.

6223-25 Vernon Avenue

Lot 8, South 24 feet thereof, and Lot 9, North 14 feet, except the South 7 feet of the East 32 feet, in Block 6, in Resubdivision of Blocks 11 and 12, in Resubdivision of Washington Park Club Addition to Chicago.

Legal title is held by Stephen H. Larson, and an undivided half interest, and an undivided one-half to Carl E. Anderson and Ben Nelson.

They obtained title by warranty deed in January, 1927, from Benjamin Nelson and Anna Nelson and Carl E. D. Anderson and Gertrude Anderson.

[fol. 229] Document No. 9,516,090, in Book of Records 23,975, at page 415.

The purported signatory to Plaintiffs' Exhibit 5 and listed in Plaintiffs' Exhibit 5C as having signed is Spencer Larson.

6053-59 Champlain Avenue

Lot 17 and Lot 18, the West 7.37 feet in Block 14, in Lincoln Brooks Park End Subdivision.

Name of record title holder is Herman L. Tucker, who obtained title by warranty deed December 17, 1927, from Jennie Livingston and Samuel Livingston.

Document No. 9,874,530, in Book of Records 25,420, at page 185.

The purported signatories to Plaintiffs' Exhibit 5 and listed in Plaintiffs' Exhibit 5C as having signed are Samuel and Jennie Livingston, whose signatures, however, were not notarized or acknowledged.

6052-58 South Parkway

Lots 8 and 10 in Parker's Resubdivision of Block 3, except Lot 18, and all of Blocks 1 and 2.

Name of record title holder: Nathan Baumgarden, who obtained title by deed on January 15, 1919, from Greenebaum Sons Bank & Trust Company.

Document No. 6,456,265, Book of Records 15,085, on page 538.

The name of the purported signatory: Emma J. Long. This purported signature appears in Plaintiffs' Exhibit 5 and is listed in Plaintiffs' Exhibit 5C as having signed.

[fol. 230] 6024 St. Lawrence Avenue

Lot 7 in Block 3 in MacChesney's Subdivision in Mayer's Re-subdivision.

Gustave Ziedler obtained title by warranty deed in January, 1927, from Frederick C. Grant and Frieda W. Grant.

Document No. 9,523,354, Book of Records 23,993, page 167.

Henry W. Lucas purported to sign Plaintiffs' Exhibit 5 and is listed in Plaintiffs' Exhibit 5C as having signed.

6207 Rhodes Avenue

Lot 3, in Block 8, Resubdivision of Lots 11 and 12, Resubdivision of Washington Park Club Addition to Chicago.

The name of the record title holder is Simon Mayer, who obtained title by warranty deed in 1910 from Axel H. Anderson and Selma Anderson.

Document No. 4,611,407, recorded in Book of Records 11,127, at page 419.

Plaintiffs' Exhibit 5 is purported to have been signed by Emma Mayer, who is listed in Plaintiffs' Exhibit 5C as having signed.

6723 Champlain Avenue

Lot 24, North 30 feet thereof, in Block 6, in Resubdivision of Washington Park Club Addition to Chicago.

Name of record title holder: Mary H. Conrad, who obtained title by warranty deed from Washington Park Club, [fol. 231] a corporation, February 3, 1908.

Document No. 158,882, recorded in Book of Records 10,165, at page 391.

The person who purported to sign Plaintiffs' Exhibit 5 and who is listed in Plaintiffs' Exhibit 5C as having signed is Margaret McGann.

6211 Rhodes Avenue

Lot 4, Block 8, in Resubdivision of Lots 11 and 12, in Resubdivision of Washington Park Club Addition to Chicago.

The name of the record title holder is Molly Schwartz, who obtained title by quit-claim October 9, 1927, from Movus and Dora Spitzer.

Document No. 9,824,013, Book of Records 25,301, page 64.

Martin McManaman signed or purported to sign Plaintiffs' Exhibit 5 and is recorded in Plaintiffs' Exhibit 5C as having signed for this property.

6241 Champlain Avenue

Described legally as Lot 20, the North 25 feet thereof, and Lot 21, the South 2 feet, in Block 6, in the Resubdivision of Washington Park Club Addition to Chicago.

The legal title holder of this property is Margaretha M. Mitsch who obtained title by warranty deeds in 1912, March 16, 1912, from Mollie and Prestley G. Stoll.

Documents Nos. 4,929,922 and 4,929,923, recorded respectively, in Books of Records 11,728 and 11,797, at pages 547 and 223.

[fol. 232] Helen Mitsch purported to sign Plaintiffs' Exhibit 5 and appears in Plaintiffs' Exhibit 5C as signatory.

6125 Evans Avenue

Lots 30, the North 8 feet thereof, Lot 31, the South 22 feet, in Block 1, in Resubdivision of Washington Park Club Addition to Chicago.

Rozella M. Thompson obtained title by warranty deed October 1, 1917, from James and Rachel Coolen.

Document number 6,218,068, recorded in Book of Records 14,598, at page 338.

The name of the purported signatory to Plaintiffs' Exhibit 5 and appearing in Plaintiffs' Exhibit 5C as signer is Mrs. Walter Ridge.

6237 St. Lawrence Avenue

Described as Lot 21, the North 20 feet, and Lot 22, the South 5 feet, in Block 8, in Resubdivision of Washington Park Club Addition to Chicago.

The legal title holder of this property is John A. Burke. The signatory to this property in Plaintiffs' Exhibit 5 and Plaintiffs' Exhibit 5C is Ruth S. Ritze, and as to that the Book of Records was missing and could not be examined as to that parcel.

6138-40 Vernon Avenue

Lots 13 and 14, the North 19 feet, in Block 4, in Resubdivision of Blocks 11 and 12, in Resubdivision of Washington Park Club Addition to Chicago.

The name of the legal title holder is Sarah Rodkin who [fol. 233] obtained title by warranty deed in 1923 from William H. Smith and Lula B. Smith.

Document No. 8,202,363, recorded in Book of Records 19,333, at page 522.

Ben Rodkin appears in Plaintiffs' Exhibit 5 and in Plaintiffs' Exhibit 5C as the purported signatory.

6217-19 South Parkway

Legally described as Lot 4 in Block 11, Resubdivision of Washington Park Club Addition to Chicago.

The name of the legal title holder is J. Bernard Senger who obtained title by warranty deed February 18, 1916, from Frances and John W. Ryan.

Document No. 5,813,789, recorded in Book of Records 13,816, at page 215.

The next is legally described as Lot 14, the South 15 feet thereof, and Lot 15, the North 25 feet, in Block 14, in Lincoln Brooks Park End Subdivision.

The name of the legal title holder of this property is Oscar S. Seaver who obtained title September 26, 1927, from Edward D. Roseen and Agnes Roseen, his wife.

Document No. 9,790,709, recorded in Book of records 25,224, at page 41.

6243 Vernon Avenue

Described as Lot 15, Block 6, in Resubdivision of Washington Park Club Addition to Chicago.

The name of the legal title holder is Joseph T. O'Malia [fol. 234] who obtained title by quit claim March 3, 1926, from Marie Watson, a widow, John R. Watson, a bachelor, Frank J. Watson, his wife, Mary V. O'Malia and Joseph O'Malia.

Document No. 9,196,193, recorded in Book of Records 22,402, at page 268.

The name of the purported signatory in Plaintiffs' Exhibit 5 and Plaintiffs' Exhibit 5C is Morris Stein and Koltz.

6124 Eberhart Avenue

Described as Lot 32 in Block 3, in the Resubdivision of Lots 11 and 12, in the Resubdivision of Washington Park Club Addition to Chicago.

Carrie M. Stephenson obtained title by warranty deed October 5, 1911, from Eugenia R. Auen.

Document No. 4,843,107, recorded in Book of Records 11,546, at page 637.

The purported signatory appearing in Plaintiffs' Exhibit 5 and Plaintiffs' Exhibit 5C is George Stephenson.

6114 Rhodes Avenue

Described as Lot 35 in Block 2, in the Resubdivision of Lots 11 and 2, in the Resubdivision of Washington Park Club Addition to Chicago.

Mary Sullivan appears as the record title holder having obtained title by warranty deed March 13, 1911, from J. Flaherty, Mary Flaherty, and John and Elizabeth Schroeder.

Document No. 4,722,023, recorded in Book of Records, 11,367, at page 224.

Terrance Sullivan appears as the purported signatory [fol. 235] to Plaintiffs' Exhibit 5 and appears listed in Plaintiffs' Exhibit 5C as a signer thereof.

6018 Eberhart Avenue

Described as Lot 43, in Block 2, in J. J. Mitchell's South Park Subdivision.

The legal title holders are Hugh Crary and his wife Elizabeth, as joint tenants, who obtained title by warranty deed February 5, 1920, from Catherine Hayes, Daniel Hayes, Henry F. and Mary O. Hayes.

Document Number 6,745,214, recorded in Book of Records, 15,808, at page 242.

Plaintiffs' Exhibit 5 and Plaintiffs' Exhibit 5C have as the purported signatory Mrs. Hattie Valiquet.

6239 Langley Avenue

Described as Lot 21, the South 30 feet, in Block 4, in Resubdivision of Washington Park Club Addition to Chicago.

The name of the legal title holder is Salvatore Vanadia who obtained title by warranty deed November 29, 1927, from Robert Prager.

Document No. 9,858,509, recorded in Book of Records, 25,382, at page 61.

The purported signer to Plaintiffs' Exhibit 5 and Plaintiffs' 5C is Sam Vanadia.

6216-24 Eberhart Avenue

Described as Lots 32 to 35, in Block 6, in the Resubdivision of Blocks 11 and 12, in the Resubdivision of Washington Park Club Addition to Chicago.

[fol. 236] The legal title holders are Jacob Alfrick and David Wexler, who obtained title by warranty deed October 5, 1923, from Eliza and Alexander Levy.

Document No. 8,142,798, recorded in Book of Records 19,346, page 55.

David Wexler appears in Plaintiffs' Exhibit 5 and Plaintiffs' Exhibit 5C as the purported signatory.

6219 Champlain Avenue

Described as Lot 25, the South 27½ feet, in Block 6, in the Resubdivision of Washington Park Club Addition to Chicago.

Pierl N. Andre and his wife Ethel, as joint tenants, appear as legal title holders in a conveyance by warranty deed March 5, 1919, from Herman and Helman Anderson.

Document No. 6,477,695, recorded in Book of Records 15,239, at page 110.

The name of the purported signatory to Plaintiffs' Exhibits 5 and 5C is Joseph Wolf.

6037-39 South Parkway

Described as Lots 20 and 21, in Block 1, in J. J. Mitchell's South Park Subdivision.

The names of the legal title holders are Moses Celbaum and wife Bernhardina, as joint tenants to an undivided one-half interest, and an undivided one-half interest in Fred H. Wolff and his wife, Edith, as joint tenants. They obtained title by warranty deeds September 16, 1922.

Documents Nos. 7,650,160 and 7,650,159, recorded in Book [fol. 237] of Records 17,830, at pages 388 and 387, respectively.

The names of the grantors appear as Martin and Delia McHugh.

Fred H. and Edith Wolff appear as the purported signatories to Plaintiffs' Exhibits 5 and 5C.

Isaac Kleiman, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Dr. Dickerson:

My name is Isaac Kleiman. I live at 1228 Troy Street, City of Chicago, State of Illinois. I am the same Isaac Kleiman who was the same defendant in the case of Olive Ida Burke vs. James L. Hall and Charles J. Sopkin, case No. 567,687, filed in the Superior Court of Cook County, Illinois. I did not hire a lawyer in that case. I have never seen any papers before and I have never seen Plaintiffs' Exhibit No. 30 before and I didn't sign my name to that paper. I didn't know anything about the case of Burke vs. Kleiman. Defendants' Exhibit 15 summons in the case Burke vs. Kleiman.

James Lowell Hall called as a witness on behalf of the defendants being first duly sworn testified as follows:

My name is James Lowell Hall. I live at 5411 South Michigan Avenue. I am a physician and surgeon having graduated from the University of Chicago in 1923 and Rush Medical College in 1925. I studied at the University of [fol. 238] Vienna for 18 months and am now Chairman of the Department of Medicine at the Provident Hospital and associated with the Lasker Foundation at the University of Chicago.

Defendants' Exhibit 16 for identification which I now examine is a summons in the case of Olive Ida Burke vs. James Lowell Hall and Charles J. Sopkin, case No. 567,687, Superior Court of Cook County. I received the summons and turned it over to Mr. Sam Kleiman who is now dead. After I turned the summons over to Mr. Kleiman I didn't do anything further about the case. I didn't employ an

attorney to represent me. I did not authorize Chas. J. Sopkin to file Defendants' Exhibit 17 for identification purported to be an appearance filed from me. I have never to my knowledge seen or talked with Chas. J. Sopkin, the attorney mentioned in the appearance. I have never during the course of my proceedings signed any stipulations or agreements of facts in connection with that case, I have never seen or read Plaintiffs' Exhibit No. 30 purporting to be an agreed statement of facts. I did not know the contents of the document. I did not authorize any person to represent me as attorney in the Appellate Court of Illinois.

Israel Katz called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Mollison:

My name is Israel Katz. I live at 6018 Vernon Avenue. Tuesday, May 15, 1938, was the first time I had ever seen [fol. 239] Plaintiffs' Exhibit 5. My signature appears on page 19, of Plaintiffs' Exhibit 5 and never to my knowledge did I sign that document. I signed the sheet upon which my name appeared which was presented to me with 2 or 3 sheets of paper. A man told me he was getting up a list of signatures for the improvement of the neighborhood. He did not tell me he was a notary public nor did he say anything about restrictions against the sale of my property. I am familiar with the manner of taking acknowledgments to deeds and nothing like that appeared. I know this sheet wasn't a deed. When I signed it no one explained the contents of the instrument to me nor did the man who presented the instrument say anything about any agreement. I know James Joseph Burke but I never had any conversation with him about the sale of my property at 6018 Vernon Avenue. I am familiar with the occupancy of the building at 425 and 427 East 60th Street and 6004 to 6014 Vernon Avenue. The building is 12 feet away from my property and there are colored people living in it now. The building on the Southeast corner of 60th Street and South Parkway is occupied

by colored persons and has been so occupied for more than 3 years. The three apartment building at 423 East 60th Street has been occupied by colored people for 5 or 6 years.

Cross-examination.

By Mr. Churan:

I appeared as a witness at the hearing of the Board of Education in the matter of William I. Sexton, a colored real estate broker. I appeared because I got a subpoena [fol. 240] and I didn't know what it was all about. I don't know who delivered this subpoena.

Jay B. Crook called as a witness on behalf of the defendants, being previously duly sworn, testified as follows:

Direct examination.

By Mr. Stradford:

When I testified before, I stated that I knew the Hansberry property was in a restricted area. I started to say, but I understood that they didn't have the required amount of signatures on the agreement but was cut off. I didn't conspire with said James Joseph Burke with reference to purchase of 6140 Rhodes Avenue, nor did I conspire with any one — respect to purchasing or mortgaging of 6140 Rhodes Avenue. I did not know of my own personal knowledge whether 6140 Rhodes Avenue was covered by the alleged restrictive covenant. I was not asked by any officers of the First National Bank of Englewood at the time I purchased this property whether I was going to sell to colored people. There was no discussion at any time.

Cross-examination.

By Mr. Churan:

I was not a broker in January, February, and March of 1937, nor did I have to be a broker to buy a piece of property. I knew Mr. Hansberry wanted a piece of property near the Sexton school because his children went there.

[fol. 241] CARL A. HANSBERRY called as a witness on behalf of the defendants, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Stradford:

I testified previously in this case. I have not conspired with anyone with reference to purchasing or mortgaging the property at 6140 Rhodes Avenue. I own and operate my own property, also a gasoline filling station. I was accountant for the Board of Education for 2 years, then United States Deputy Marshal in 1929-30-31.

Cross-examination.

By Mr. Churan:

I did not know James Joseph Burke at the time of the case Plath vs. Delaunty was being tried. The first time I saw the name of James Joseph Burke was when I was Secretary of the National Association for the Advancement of Colored People, and I sent out some circular letters. I was interested in getting in the area where I now live so that my children could go to Sexton School. I moved from 4418 South Parkway because the school was crowded and the children could not go to school all day and all the schools in that immediate vicinity permitted kids to go to school only a half day and I wanted my children to go to school all day. That is why I moved in there.

Defendants' Exhibits 15 and 16 and 17 received in evidence as Defendants' Exhibits No. 15, 16 and 17.

[fol. 242] JOHN P. EDELEN called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Dr. Dickerson:

My name is John P. Edelen. I live at 5324 South Parkway and I am a real estate broker in the City of Chicago. I have been a broker for 12 years, having dealt during that period

in mortgage loans, real estate management, real estate sales and purchases. I have been associated with the Chicago Mortgage and Credit Company and am at present with Edelen-Bland and Company. I graduated from the University of Illinois in 1926, with a Degree of Bachelor of Science in Commerce. I am not a member of the Chicago Real Estate Board because that organization does not admit colored. During the last 12 years I have made loans on hundreds of pieces of property, so many pieces of property in Chicago and suburban districts and have had occasion to appraise and value many buildings in the City of Chicago and mostly on the South Side district of the city. I have appraised buildings in the district commonly known as the Washington Park Subdivision including the area from 60th to 63rd and from Cottage Grove Avenue to South Park Avenue. I have made appraisal reports for the Great Lakes Mortgage Company, the Mortgage correspondence for State Mutual Life Assurance Company, the Chicago Mortgage and Credit Company and the Illinois Federal Building and Loan Association, Supreme Liberty Life Insurance Company and private individuals. All of my appraisals have [fol. 243] been accepted by the various organizations and persons for whom I made them. I have known the building at 413 E. 60th Street for the past 10 years. I made my first inspection of that property in April, 1937, because I had a client who was specifically interested in it. I also inspected the building on Saturday, March 12, 1938. I went inside the building. I have had opinion as to the fair market value of the property at 413 E. 60th Street in April, 1937, and set the value at $7,500. The fair market value as of March 12, 1938, I would set at $8,000. Improvements made between the time of my visits have enhanced the building at least $500.00. I am acquainted with the building at 6140 Rhodes Avenue and have known that building for the last 2 or 3 years. About 3 years ago, I made a survey of the whole district with possible sales in view. I also made inspection of the building on last Saturday, March 12, 1938. I inspected the building to appraise its value. The fair market value of the building as of May, 1937, I would estimate to be $9,000.00. The fair market value as of March 12, 1938, for the same property, I would estimate to be $10,000.00. Improvements that have recently been made have enhanced the value of this property. New bathrooms and complete new fixtures throughout the building have in my opinion increased the

value of the building throughout a thousand dollars. I am familiar with the South Side district of Chicago and that term is usually used to include the areas between 23rd streets on the North, Cottage Grove Avenue on the East, 70th street on the South, Wentworth Avenue on the West. 80% of the [fol. 244] occupants of the district are colored. South of 51st street in 1927, the occupants of the district to 70th street was about 60% colored and 40% white. Now I would say that there is not more than 4 or 5% white in that district. The remainder being colored. In the area between 22nd street on the north, 39th street on the South, Cottage Grove Avenue on the East and Wentworth Avenue on the west during the last 3 years many of the buildings have been condemned and torn down by the City of Chicago. In my opinion about 7,000 families and 25,000 persons, most of them colored have been forced to move South of 39th Street. This instituted doubling up and utilizing every available dwelling space. Apartments that had formerly housed a single family were now converted into kitchenettes with a family in each room. The income from such a conversion was more than doubling in almost every individual case. Most of the building owners were absentee landlords. The effect of the movement of a large number of people had raised the rents. I am familiar with the area commonly called the Washington Park Subdivision. The building at 6000 South Parkway composed of either 24 or 36 apartments is occupied by colored and has been for the last 3 or 4 years. The building at 6001 South Parkway is a large apartment building occupied by colored. The buildings at 6009-6011-6019-6021-6049-6051 generally 6 flat buildings are occupied by colored tenants. The buildings at 6012-6018-6020-6024-6034 are all occupied by colored. The property at 6028 South Parkway is a hotel. 413 E. 60th Street is about 150 feet from the corner of 60th street and South Parkway. The majority of the buildings on 60th street be-[fol. 245] tween South Parkway and Vernon Avenue are occupied by colored. During my experience as a real estate broker, I have collected rents from buildings occupied by white tenants and later from colored tenants in the same building. If the tenancy has been changed from white to colored the colored usually paid a rent increase from 10 to 40% over the rentals paid by the white and where no appreciable changes in the construction of the building were made. In my experience I have known of the occupancy of a col-

ored family in a block largely occupied by white people and the presence of the colored family having no material effect upon the value of the remaining property in the block. The mere presence of the colored family does not cause the property to depreciate in value. The presence of a colored family at 6140 Rhodes Avenue assuming that all of the other occupants of the area between 60th and 63rd streets are white would not cause the value of every piece of property in the area to depreciate but on the other hand would cause the prices to increase. The same would hold for a colored family at 413 E. 60th Street.

Mr. Churan: I object, if the court please, because that building is not involved in this action only as a matter of conspiracy. In my opinion the effect of the presence of colored tenants usually causes the rents to increase.

The Court: Has that been true of areas north of this area?

The witness: It has.

The Court: Wherever the colored people came in the price of property has increased?

[fol. 246] The Witness: The price of property has increased because there is greater demand for colored apartments and in most apartments the landlords usually require that the rent of colored tenants be raised. There are thousands of colored persons looking for apartments on the South Side. I have at least 25 applicants or persons seeking to purchase residential properties. I have inspected the properties on all streets in the so-called Washington Park Subdivision looking at the For Sale sign. I have noticed the general appearance of the buildings in that area and I have compared and contrasted them with the buildings between 61st and 63rd streets on Indiana Avenue and between 55th and 59th Avenues on Lafayette and Cottage Grove, the last two areas being occupied by colored persons. The general appearance of the last two named areas is the same as the general appearance of the buildings in the Washington Park Subdivision. The general structure of the buildings in the three areas is the same. The continued vacancy of property tends to depreciate its value and has a tendency to lower the sale price.

TRACY W. CHAMPION, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

I am a real estate broker with offices at 114 E. 51st Street. I have been a broker in the City of Chicago for more than 20 years. I am connected with the real estate firm of Champion and Black. I made many sales and have appraised in value many buildings on the South Side of Chicago. I have [fol. 247] appraised buildings for banks, insurance companies, mortgage investment firms and private investors. I am familiar with the building at 413 E. 60th Street and I had occasion to inspect it in March, 1937. I went in it because it was vacant. I also looked at other property in the same neighborhood. Following my inspection I negotiated the sale for the building at 423 E. 60th Street, 3 apartment building. In my opinion the building at 413 E. 60th Street in April, 1937, was worth $7,500.00. The building in March, 1938, in my opinion was worth $8,500. The basis for the increased value has been the general renovation and repairing done in and on the said building. I have known the building at 6140 Rhodes Avenue for over a year. I went in one apartment on the first floor. I estimated the value of the property at the time to be $10,000.00. The fair market value in March, 1938, is $11,000, the increase being due to repairs. I had had experience in the management of properties in the Washington Park Subdivision. My firm manages the building at 425 and 427 E. 60th Street and 6004 to 6014 Vernon Avenue. The average rent of apartments in the building when I took it over was $27.50. The rents have increased just as they have in all buildings occupied by colored.

FENTON W. HARSH, JR., called as a witness on behalf of the Defendants, March 22, 1938, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Dickerson:

I lived at 4523 Calumet Avenue and have been in the real estate business for 21 years. I have had numerous [fol. 248] occasions to appraise and value property on the

South Side. In 1926, I was land purchasing agent for the United States Government in a slum clearance project. I have been familiar with the building at 413 E. 60th Street for 20 years. In 1937, I noticed that the building was vacant with dirty windows and inhabited by a caretaker. I went in then because I thought the building could be sold. At that time, in my opinion, the property was worth $7,500.00. In March, 1938, the building was worth $8,500, the increase being due to improvements as sand blasting, window trimming, new light fixtures and a new bathroom. I am acquainted with the property at 6140 Rhodes Avenue. In 1937, May of that year I appraised the property at $10,000. In March, 1938, I appraised it at $12,000. The increased value is due to the repairs that have been made on the property. The area on the South Side between 37th and 39th has been purchased by the government and all of the people living there had to move out. About 20,000 persons have had to move out. A lot of people have had to live in kitchenettes. I am familiar with the Washington Park Subdivision and know that the west boundary line of that subdivision is occupied by colored. I have collected rents from many buildings occupied by white tenants and in my experience the average rent paid by white tenants prior to a change in the racial occupancy of the building is 25% lower than the rents paid by colored occupants. In some cases, colored tenants have paid as much as 80% more rent. I had a concrete case in a building in the Washington Park Subdivision on the southwest corner of 60th and [fol. 249] South Park, a 30 apartment building. The rents were raised immediately on this property when colored moved in. I have numerous applications in my office for the sale of property in the so-called Washington Park Subdivision. One piece of property at 539 E. 60th street is a stuccoed steam heated, 3 story building for which $8,000.00 is being asked, there is a first mortgage of $4,000.00. At 6247 St. Lawrence Avenue, the owner of that property changed his price in 60 days recently from $6,000.00 to $8,500.00. The presence of a colored family in a block occupied by whites raises the value of the property when the whites get ready to sell. A colored family at 6140 Rhodes Avenue or 413 E. 60th street would have the effect of increasing the sale of the value of surrounding property. The mere fact of the presence of colored people would not hurt the value of the property. I could sell the property

easier in the Washington Park Subdivision if there were no restrictive agreements.

Mr. Howard D. Gould, called as a witness on behalf of the Defendants, being first duly sworn on oath, testified as follows:

Direct examination.

By Mr. Dickerson:

My name is Howard D. Gould. I reside at 3763 South Wabash Avenue. I am a Director of Industrial Relations and Research for the Chicago Urban League, an organization for social work among Negroes. The Urban League has a general membership and a general or mixed Board of Directors including Albert Bancroft Pierce, Edwin Foss Wilson, Bertram J. Kahn, Miss Amelia Sears and others. [fol. 250] I received my A.B. at the University of California in Economics. I received my M.A. in Economics at the University of Pittsburgh and have completed all the resident requirements for a degree of Doctor of Philosophy at Harvard in Economics. Since leaving Harvard University, I worked as a fellow of the National Urban League in Pittsburgh for 9 months, making a study of urban living conditions. During the past 4 years in the City of Chicago, I have been engaged in studying different aspects of the economic life of the colored community in Chicago. In 1935, I did the work for the Council of Social Agencies bringing down to date all the previous studies of the economic and social life of the Negroes in Chicago. I am a member of the Housing Board of the Illinois State Employment Service and was an adviser to the division of the Homestead Subsistence for the United States Government. I have made a study of the trend of population of colored and white on the South Side of Chicago from 1900 to the present time, having prepared the information for the Council of Social Agencies and for the Housing Division of the Public Works Administration. In my study, I started with the United States Bureau of Census. In 1900, there were 44,103 and between 1910 and 1920 there was a considerable increase *to* 109,458 to 233,903. In 1934, there were 236,500 colored persons in Chicago. The colored population is 6.9%

of the total population in the City of Chicago. In 1900 the colored population was well distributed over the entire city. There were no areas where there was a 70% Negro population. Between 1910 and 1920 and particularly in 1914, the [fol. 251] World War broke out and immigration stopped. From 1913 to June, 1914, there had been immigrants from Europe into the United States and that stopped immediately in 1914. Owing to the expansion of industry in Chicago, the industrialists of Chicago began bringing Negroes to the City. The Negro population districts began to spread southward along the industrial areas west of State street over toward the stockyards in the general direction of the industrial areas where they worked. Between 1910 and 1920 there was a fairly well defined residential community. Between 1920 and 1930 industry continued to expand. The Federal Government continued to shut down on immigration and the manufacturers continued to bring colored workers from the South. The colored community began to move southward out toward 55th street. Then too, between 1920 and 1930 large numbers of Negroes wanted to leave the area of old residences which surrounded the loop into small homes or apartments as against the large mansions and old large apartment buildings which they had occupied and which were unsuited for low income groups. The buildings nearest the loop were originally constructed for occupancy by well to do people and were 14 and 15 room mansions. These buildings were inhabited first because they were nearest industry and next because the former owners began moving to the suburbs. As soon as the wage earners in this area earned enough they too wanted to move into better locations so they moved into an area like the Woodlawn area bounded by 63rd on the north, South Parkway on the west, South Chicago Avenue on the south and Cottage [fol. 252] Grove Avenue on the east. Approximately 12,000 persons live in this area. Then too, there has been a number from the lower South Side area because of the demolition project started by the Illinois State Housing Board on May 15, 1934. About 1400 buildings have been demolished on the northern edge of the Negro building area; approximately 6,000 families or 18,000 persons have had to move further south as the demolition program progressed. The number of available houses decreased and the rentals went up. As a result of the terrific overcrowding health and morale in the community suffered. In 1936, I made a com-

parative study of rentals in the Negro residential communities. I compared the rents paid by people of similar wage earning groups. In community tract bounded on the North by 22nd street, on the west by Wentworth Avenue, on the South by 39th street and on the east by Cottage Grove, I found the average rental to be $22.00 per month. Between 39th and 51st street, South Parkway and Wentworth Avenues, the average rent was $29.00. Between 51st and 63rd street South Parkway to Cottage Grove, I found the average monthly rental was $33.00 per month. For a white area corresponding to 22nd to 39th street area the average monthly rent I found to be $17.00. The white population living there work in the stockyards and industrial areas along with colored and their work incomes are about the same. For a white area corresponding to the other two areas the average rent was $30.00 a month. The first area I mentioned paid an average monthly rental of only $6.00 a month below the average for the study generally and 30% [fol. 253] higher rental than rents for similar property in other communities. Rents in the South Park Sub-division for 1934 and 1935 were approximately 40% less than rents in the far South Side colored community. I base my findings upon the procedure outlined in the Real Estate Analyst. I take the advertisements of apartments for rent appearing in Sunday papers from week to week to get both a vacancy rate and a rental rate. I am familiar with the Washington Park Sub-division and know immediately to the north of that area is a public park bound on the North by 51st street, east by Cottage Grove Avenue, west by South Parkway, south by 60th street and joining the Midway which proceeds to Jackson Park and the lake in the park serves the South Side Community. I would say that the spectators at the various events are 70% or 80% colored. The park also serves the Woodlawn area. I referred to the public school and ingress or egress through the public streets running through the Washington Park Sub-division. There is a public school located on the corner of 60th and Evans Avenue. There are numerous areas in the City known as white neighborhoods in which there are large numbers of Negroes, for example, at 4600 North on Winthrop Avenue, there are a number of Negro families and then around North Avenue, a couple of blocks west of Michigan Avenue there are several thousand Negroes. The general conditions of the buildings has not changed since the moving in of Negro families.

The presence of Negroes do not cause the property of the remaining owners of the block to depreciate. I prepared Defendants' Exhibit 18 for identification which I now ex-
[fol. 254] amine and it shows the location of the Negro Residential area in Chicago and the population as of 1934.

Cross-examination.

By Mr. Shannon:

The mere fact of white occupancy of property does not in and of itself indicate high rentals but you must consider the occupation groups. Census figures that indicate absolute rentals do not give an absolute picture for the reason that they do not indicate what the various groups get for the amount paid, which would indicate that the colored person pays a greater rent per room. In the area "35," the white people were paying $17.00 per month for more room than the colored were paying for.

The Court: You account for this whole thing because of the congestion or lack of availability of space for colored people.

The Witness: Yes sir.

The Court: So there is greater demand for occupancy by colored than white.

The Witness: Yes sir.

The Court: There is a premium on space?

The Witness: Yes, sir. I can substantiate that by our findings here if you want me to. I have not attempted to discredit the census report showing average rent by native born white and colored by merely explaining the report to show that it does not set out the facilities obtained for the rent paid.

The Witness: That is a mechanism or a device for exploitation. A specific example is a building at 6033 State Street [fol. 255] that is normally a 3 story, 3 apartment building with six room apartments which would normally rent for $60.00 a month per apartment, and in that building as in other buildings they rent each room separately for those not desiring to rent the six rooms as a unit, so that you will find two or three persons living in one room paying the rent, as in that building. Paying $5.00, $5.50, and $6.50 a week for each room, the rent averages around $22.50 per room per month for each apartment. For each apartment the

rent average is $132.00 a month and the income from the building is $400.00 per month against the normal rent income of $180 per month. That is what the housing congestion has led to.

The Court: They are simply capitalizing on the congestion.

The Witness: They are simply capitalizing.

HARRY H. PACE, having been previously sworn, resumed the stand and testified further as follows:

Direct examination.

By Mr. Dickerson:

I am President of the Supreme Liberty Life Insurance Company, which is one of the defendants in this case along with me. I graduated from Atlanta University, Atlanta, Georgia, in 1903, and taught school for 2 years thereafter and then was Cashier of the Solvent Trust and Savings Bank in Memphis, Tennessee, for 6½ years. I then helped organize the first old line legal reserve life insurance company ever organized by colored people which was the Standard Life Insurance Company of Atlanta, Georgia, then [fol. 256] moved to New York City where I became head of the music publishing concern known as Pace-Handy Music Publishing Company. In 1925, I became President of the Northeastern Life Insurance Company in Newark, New Jersey. I became President of the Supreme Liberty Life Insurance Company of Chicago in 1929. I did not conspire with James Joseph Burke to violate the alleged restrictive covenant on the property at 413 E. 60th street and 6140 Rhodes Avenue. I did not conspire with Jay B. Crook or Carl A. Hansberry to violate the alleged restrictive covenant. I did not know the defendant Jay B. Crook in May, 1937, nor did I have any conversation with the Englewood Bank in April and May of 1937, or at any other time. I did not do any of the foregoing acts either as an individual or President of the Insurance Company. On the 17th of April, 1937, I did not have any interest, legal or equitable or otherwise in the premises at 413 E. 60th Street.

TRUMAN K. GIBSON, JR., was recalled and testified further as follows:

I have 43 documents which have been marked Defendants' collective Exhibit 19 for identification and state they are certified copies of the conveyances for the doubtful properties previously discussed by me and set out in Defendants' Exhibit 14. The original documents were not accessible. These documents represent the recorded ownership of the property therein described as of September 30, 1927, and February 1, 1928. Documents offered and received in evidence and marked Defendants' collective Exhibit No. 19.

[fol. 257] Defendants' Exhibit 20, being the certified copy of the complaint in the case of Anderson vs. Hansberry, 37S 7357 and Defendants' Exhibit 21 being a summons, marked and received in evidence as Defendants' Exhibits No. 20 and 21. Defendants' Exhibit 22 for identification purporting to be an opinion rendered by the Appellate Court of Illinois in the Plath vs. Delanty received in evidence as Defendants' Exhibit 22 for identification.

Defendants' Exhibit 23 for identification was received in evidence as Defendants' Exhibit 23, the same being certified copies of certain pleadings shown in transcript of record for appeal in Burke vs. Kleiman No. 567687, Superior Court, Cook County, to the Appellate Court of Illinois, First District, No. 37522, showing the following: (a) exceptions taken by plaintiffs in several answers of defendants based alone on issue of abandonment and change in character and condition of adjoining property and extent of isolation; (b) Order overruling exceptions; (c) stipulation signed by H. E. Raymond, solicitor for plaintiff, and Charles J. Sopkin, solicitor for defendants, that cause be heard upon agreed facts to be stipulated without necessity of taking oral evidence; (d) A further stipulation to enter into stipulation of facts.

[fol. 258] HOWARD A. ROUNDS, called as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Dickerson:

My name is Howard A. Rounds. I live at 526 North Spring Avenue, La Grange, Illinois. I am a handwriting

expert. My offices are located at 123 W. Madison Street, Chicago, Illinois. I have been examining questionable documents for over 25 years, nearly 30. I have been consulted in some over 3,000 disputable documents. I was handwriting expert for the American Protective League working under the Department of Justice of the United States Government during the World War.

I have examined Plaintiffs' Exhibit 5, 5A, 5B, and 5C, and I have seen the originals and in making this examination I used a microscope affirming many of the items and I compared many of the signatures.

Plaintiffs' Exhibit 5, the first item of which I wish to call attention to is on page 2—the item marked parcel No. 45, there appears on that line Parcel No. 45, there appears the signature of Richard H. Schweitzer. Underneath that signature is another signature that has been chemically erased or partially erased and that signature is Mann H. Israel; on page 2 appears the signature of H. A. Melville, 6121 Evans Avenue and then just Mrs. W., the surname is missing on the woman's name. On the line marked Parcel No. 12, still on page 2, there are two signatures, Alyce Barker and Spencer Barker. These two signatures, were in my opinion written by one of the same persons. On page 4 [fol. 259] in the upper left hand corner is a piece of property that has place for five signature lines pasted to the upper left hand corner, the first two lines at the top of this slip of paper have some pencil writing that has been erased. Parcel No. 64, on page 4 has three signatures written on it, one of them is Young, another Nelson and another Johnson, but to the right are the words "Mission Tabernacle." Now those words "Mission Tabernacle" in my opinion were not written by anyone of the three persons, but in my opinion were written by the person who signed a notarial certificate as Fred L. Helman. On page 5, with a line that bears no parcel number, four lines from the top of the left hand side is pencil entry "Elliot signed on Eberhart." That entry was made by the person who signed the signature Fred L. Helman. On page 5, on the right hand side of the document toward the bottom appears a slip of paper that has been pasted. On page 5 appears a parcel No. 422 and 152. On parcel No. 403, there appears the name of Mary F. I don't know if I can make out what the word is but underneath that is the remains of a signature of W. A. Lewis, which is chemically erased. Now on page 6, on parcel 104 appears

two signatures, Harry Feurer and Josephine Feurer. These two signatures in my opinion were written by one of the same person. On page 7, parcel number 418, there is a signature Liebowitz and above that signature is the memorandum "Cong. Beth Jacob" and then the rest of this refers to Jewish Synagogue (Begale-Anshe-Mashrack), which in my opinion were written by the person who signed the name Fred Heiman to the acknowledgments on the Exhibits 5A. [fol. 260] In the lower left hand corner of page 7 is the name of Samuel Levingstone and underneath that was a parcel letter that has been almost erased, part of it is left. On the 2nd line from the top of the right hand side there are two lines of parcel writing that have been erased and then over the top of one of them is the name Jessie R. Broadbent that has been partly erased by chemicals. On the next line below is the signature of Jessie R. Broadbent that has been partially erased by chemicals. On the next line below is the signature of Jessie R. Broadbent. On page 10, no parcel number, the second line from the top on the left hand side, there is a pencil writing that has been partially erased and on parcel number 464 there appears two signatures, Stella J. Lambros and Ray J. Lambros, both written by the same person. On the last line on the bottom at the left side Philip Lawtry's name signed and partly erased. The entry in my opinion was made by the same person who signed the name Fred L. Helman. On page 11, parcel number 173, is the signature of Adolph Mallace, underneath that was originally Louis Heintz which has been partially erased. On the second line from the bottom of the left hand side, there appears an item signed, following number 215, Deunbaugh, that item in my opinion was written by Fred L. Helman. On the 3rd line from the top on the right hand side and no parcel number is the name Raber. On page 12, parcel 234, there are the signatures Martin Mortensen and Emma C. Mortensen, both written by one person. Parcel No. 204, Mrs. William J. Scales and William J. Scales were both written by one person. On page 13, [fol. 261] parcel Number 532 there are two signatures Marie Del Bello and under that Ugo Del Bello that were both written by one person. On page 15, parcel number 342 the signature Joseph Kahn and John L. Kahn were both written by the same person. On page 18, parcel number 338, Trinity Congregational Church was written by Fred L. Helman above the signature of Hatfield. On parcel num-

ber 500, on page 19, the two signatures Adolph Schatzberg and Rose Schatzberg were both written by one person. On page 20, line 6 from the bottom of the left hand side the signature of Charles J. Linton was chemically erased. On parcel number 340 there is pencil writing which has been erased. On parcel No. 245 P. J. Sheedy assisted in making the signature of Morris Stein by cross and made the necessary writing to consummate the signatures. The second line from the top of page 223, the signature has been chemically erased. On parcel No. 425, on page 24, there are two signatures, Rebecca Tasemkin and Nathan B. Tasemkin that were in my opinion written by the same person. After parcel 436, there are the signatures William Roy Westfhal and Milinda J. Westfhal, both written by the same person. On all my testimony to write similar I base it not only on the formal letters but the space and swing and everything that goes to make up a signature.

Cross-examination.

By Mr. Churan:

I have no way of testing when the erasures were made.

Thereupon the Defendants rest.

[fol. 262] Honoria Brazil, called as a witness on behalf of the defendants in rebuttal, having been first duly sworn on oath, testified as follows:

Direct examination.

By Mr. Churan:

I live at 6140 Rhodes Avenue and my husband's name is John E. Brazil. I am acquainted with the building at 6140 Rhodes Avenue and it has an old-fashioned basement like mine. There are small porches on the rear of the building.

MARY PYLE called as a witness on behalf of the plaintiffs in rebuttal.

Direct examination.

By Mr. Churan:

I am familiar with the property at 6140 Rhodes Avenue since 1928. I do not know any changes that might have taken place inside of the building.

JOHN P. SHEEDY called as a witness on behalf of the plaintiffs in rebuttal, having been previously duly sworn testified as follows:

Direct examination.

By Mr. Churan:

I did not know Israel Katz and Helen Katz before they signed this. I went to get Mr. Katz' signature with Charles E. Nathan who was a real estate broker on 61st near Evans Avenue. I took him along because he spoke the same language as they did. Nathan spoke to them in their language. Katz did not speak any English that I remember. All he did was grunt. He seemed dumb.

[fol. 263] Cross-examination.

By Mr. Stradford:

I only went to Mr. Katz's once by invitation of Mr. Nathan. Mr. Nathan wanted me to go.

Q. How did Mr. Nathan happen to extend you an invitation to go there?

A. He said, "I got a kike up here who will sign. Come on over."

Q. He said "kike."

A. Yes.

Q. And you went to the home of Mr. Katz on that invitation?

A. Yes, sir.

Q. You had never seen him before?

A. No, sir.

Q. You had never seen Mr. Katz before?
A. No, sir.
Q. You did not see him after that either, did you?
A. No I did not.

They spoke Yiddish or Jewish so I don't know what was said. I didn't make the sales talk that I usually make. I didn't get a thin dime out of this but I usually got a certain percentage of the dues for my work. I got 50 and 75% of the dues of the first year of those whose signatures I got.

CHARLES A. CHURAN, called as a witness on behalf of the plaintiffs in rebuttal having been first duly sworn, testified in narrative form as follows:

I am attorney for the plaintiffs in this case and have been the attorney for the Woodlawn Property Owners for 5 years last past and secretary of the Woodlawn Property Owners from 1933 to 1935. The first violation after the decision in the Burke vs. Kleiman was the Yondorf property on South Parkway.

[fol. 264] Mr. Dickerson: I want to object to this type of testimony. It is not a proper rebuttal. It is a part of their major case which they undertook to set out on the basis of showing diligence.

Witness continued: We filed an action in the case of Cook vs. Yondorf, 34 S. 1261. A decree was entered on October 20, 1936. On all the other violations of the agreement, we filed actions as soon as they occurred. The property at 6043 and 6045 is involved in a building case 34S 1278.

Cross-examination.

By Mr. Dickerson:

The case involving the property at 6049 and 6051 South Parkway was contested and the building is still occupied by colored. The property at 6043 and 6045 South Parkway involved in a building case is still occupied by colored. In the Cook vs. Yondorf in which there was a decree, colored still occupy the building. The case involving the hotel is still pending and colored still occupy the property.

Whereby the Plaintiffs rested their case in rebuttal which was all the evidence offered and received in hearing on the above matter.

DECISION OF THE COURT—Filed June 17, 1938

These briefs, I might say in the beginning, are certainly very studiously prepared. I read them with the greatest of interest and enjoyment, and enjoyed the use of language that has been employed in presenting your respective views. I would regard some of it as almost classical.

I have varied back and forth in my views as to how this litigation should be decided. I might say that it wasn't [fol. 265] until, oh, I would say the last hour—I worked until about fifteen or twenty minutes ago to finish my study of the problems—that I definitely made up my mind as to how this case should be decided. I know it doesn't make a great deal of difference which way it is, because whichever way I decide it, it will have to be reviewed by a reviewing Court.

The first argument that has been made by the defense why the restrictive agreement in question is not valid, I do not believe has any merit. I think that question has been unqualifiedly decided in the Corrigan case, and the language particularly by the United States Court of Appeals, wherein they say: "We are not dealing with the validity of a statute, or municipal law, or ordinance," answers the contention which is made by the defense in the first case cited in their brief where it involved the enactment of an ordinance which prohibited the settlement of colored people in a block or in a vicinity which was predominantly white. I think that situation is obviously distinguishable from the situation that we have here, and from the situation which was present in the Corrigan case, namely, where a number of white people banded themselves together in an agreement to prohibit the sale, alienation, leasing, and so forth of property to the colored race.

And the Appeals Court, the United States Appellate Court passes on it, saying:

"We are not dealing with the validity of a statute, or municipal law, or ordinance; nor are we concerned with the right of a negro to acquire, own and use property; nor are [fol. 266] we confronted with any pre-existing rights which are affected by the covenant here in question. The sole issue is the power of a number of landowners to execute and record a covenant running with the land, by which they bind themselves, their heirs and assigns, during a period

of twenty-one years, to prevent any of the land described in the covenant from being sold, leased to, or occupied by negroes.

"The constitutional right of a Negro to acquire, own and occupy property does not carry with it the constitutional power to compel sale and conveyance to him of any particular private property. The individual citizen, whether he be black or white, may refuse to sell or lease his property to any particular individual or class of individuals. * * * Such a covenant is enforceable, not only against a member of the excluded race, but between the parties to the agreement."

Now, the reasons which have been presented by counsel for defense in their ably prepared brief on the various reasons why such an agreement would be in violation of the various sections of the Constitution, the Fourth, Fifth and Fourteenth Amendments, and against public policy, and unlawful restraint, were all arguments no doubt that were presented to the Court when they rendered that decision. Apparently the well-considered law of the Court where they have passed upon such covenants has been to sustain such.

But the more serious problem that has confronted me in making up my mind as to how this issue ought to be determined has arisen out of the fact that this agreement was not signed by ninety-five per cent of the owners of the frontage [fol. 267] in the restricted area. I think the proof unquestionably shows that it was not. I did not check up the exact figures, but counsel in their brief indicate it was some fifty-five per cent instead of ninety-five per cent.

One of the provisions, of course, of the agreement was that that was a prerequisite to its enforceability. In other words, there is an invalid agreement which is now sought to be enforced. And the answer that the plaintiffs make to that contention is not to try to show that it was properly signed by the requisite number of property owners, but that its validity has already been sustained by several Courts; the Superior Court and the Appellate Court on three or four occasions.

So, I think, practically the sole question that this Court has to determine is as to whether or not, if this agreement has been held valid in such a proceeding, that it may be properly held to be res judicata, and that the defendants are estopped from urging the irregularities which appear from

the proof to exist which, were it not for such decisions, the agreement or covenant would not be binding.

We have a man named Burke whose personality and activity enters into the picture. It is urged, and I think with a good deal of merit, that the lawsuit which he brought to test out the validity of the agreement was more or less a dummy proceeding, and it can be easily seen that although it appears on the face of it to be representative and class in its character, still it was conceived by him and prosecuted by him for the sole purpose of establishing the integrity and [fol. 268] the invulnerability of the district that is under the covenant; in other words, to make it unassailable. And, to make it unassailable he wanted to bring a proceeding in Court so as to test out its validity, and to have judicial determination of that fact.

Now, then, on the other side of the picture we have this same villian, Burke, falls out with the Association he created, that he had lived off for years, and undertakes to say that he is the breathing, inspiring force behind the agreement in its conception, in its origination and beginning, and he was the principal force in bringing it about and in bringing about the lawsuit that he thought sustained its validity. Then we have him getting mad at these people and saying: "Now, I am going to bust it up."

You may say what you please about the Hansberry case and the others, the evil half of Burke unquestionably appears; and he in effect says, through himself and through those that he was working with to bring about the dissolution or to bring about the destruction of this agreement, he says in effect that, "That lawsuit that I brought was all a fraud, and I had no authority to represent the class, and I wasn't representing the class. It was my own personal lawsuit. I obtained the stipulation of the fact that the agreement contained the signatures of more than ninety-five per cent of the frontage, and that was all a fraud."

And we know it was a fraud, because the proof now shows that there wasn't ninety-five per cent.

Burke is not in a Court of equity with clean hands. He committed a fraud when he brought this lawsuit, and he is [fol. 269] just the same sort of wrongdoer and evil minded person when he threatened to and did carry out his threats that he was going to see that colored people were allowed to purchase property in this area.

I have analyzed the authorities with the greatest of care in trying to make up my mind as to whether or not the defense of res judicata is applicable or is available to the plaintiff in this case. I think we all must agree that there is a great conflict in the authorities. You can find similarity between cases cited by the defense and the plaintiffs, and it is very, very easy to arrive at two different conclusions.

It was true that the constitutionality in the original case of Burke vs. Kleiman was not urged; and on the other hand, the plaintiff cites authorities which have a good deal of weight and force, which says that res judicata applies not only to issues that were raised and actually litigated or adjudicated, but all that might properly have been, under the issues in the case. There is no doubt but what the issue as to whether or not it was constitutional for this agreement to exist and be enforced against all classes could have been presented, and should have been presented. We would never know when a subject-matter is adjudicated if such were not the rule.

Being rather in doubt about the matter, and unpersuaded definitely on the one side or the other, I have arrived at the conclusion that the Appellate Court, or whatever reviewing court takes jurisdiction of this matter when it goes up, will probably follow the Burke against Kleiman case, and [fol. 270] follow the Lee vs. Hansberry case which was passed on recently, when each of them said very definitely that the validity of this agreement has been sustained.

I am further convinced that that would be the view that a reviewing court would take on account of the fact that the position of the defense in this case is tainted with a certain amount of fraud that grows out of the conduct of Burke.

So, it will be the finding of this Court that the plaintiffs' bill is sustained. I suppose the natural result will be that the temporary injunction be made permanent. And what other relief is there you ask for pursuant to that?

Mr. Churan: Well, it is a long story, if the Court please. It is all, of course, in the injunction.

The Court: Well, you prepare the decree.

Mr. Churan: The only question—pardon me, Judge, the only questions that the Appellate Court haven't decided in the interlocutory injunction, the only question is as to the property, setting aside the deed to Hansberry. On that, of course, our contention will be that that property must

go back to Crook, or some other white person. Back to Crook.

Mr. Shannon: Why not prepare the decree, then submit it to the Judge?

The Court: You do that, prepare your decree and submit it. I take it you may have some difficulty in getting the other side to agree to it, except as to form; but you prepare it, and let's see how it reads.

Mr. Churan: Will your Honor be here next week?

[fol. 271] The Court: Yes, I think I will be here until the end of the term.

Mr. Mollison: Just a minute, your Honor. What about the defendant Katz with reference to the matter of res judicata? He did not sign the covenant, and we contended we proved fraud in the execution.

Mr. Churan: Oh, yes, he signed. His signature is on the covenant.

Mr. Mollison: No, it isn't.

Mr. Churan: What? You are mistaken.

Mr. Mollison: Your Honor didn't mention anything about that. I should like to know about that.

Mr. Churan: Why, certainly he signed the agreement.

Mr. Mollison: No.

Mr. Churan: Of course, he appeared on the stand and said that Sheedy or somebody did not explain the agreement to him, but he signed it, and it was acknowledged.

Mr. Mollison: The character of the acknowledgment was —it wasn't acknowledged or anything of that sort. It is preposterous that such could be the finding of the Court with reference to Katz.

The Court: Suppose I keep these briefs, then, until this decree is finally approved?

Mr. Churan: That is right.

The Court: Then I may want to refer to them again.

Mr. Dickerson: Does the Court in making his decision hold that this was a class suit, the original Burke vs. Kleiman? I take it that he does.

[fol. 272] The Court: Yes. As I said, you can read the authorities presented by both sides, and very logically arrive at different results. I simply indicated why I was inclined to lean the other way in a desire to be fair.

Mr. Dickerson: Does the Court have in mind as to the defendant, Supreme Liberty Life Insurance Company, that that Company did not come within the theory of class suits,

by any stretch of the mind at all, and it did not take title to the property through any of the individuals who were parties to the original suit, or privies to parties to the original suit, and that the covenant itself makes specific exceptions to the validity of liens of first mortgages?

Mr. Churan: The Court found——

Mr. Dickerson: Just a moment. I want to get it so that the record will be clear as to the basis of this decision.

Mr. Churan: Well, I object to counsel asking the Court to answer questions on his opinion.

The Court: He has a right to know what I have in mind. I will be frank about it. I think that all those defendants were a party to Burke's conspiracy. Now, I didn't say that before, but that is the way I feel about it.

Mr. Dickerson: Then, if the Court please, then I understand it then from your decision that as to the Supreme Liberty Life Insurance Company, which was not in privity to any of the parties in the original Burke vs. Kleiman suit, that you hold against that Company because of the fact that you say they were connected with Burke in the fraud that Burke committed in the first case of Burke vs. Kleiman, [fol. 273] and in the second that that fraud vitiates——

The Court: Your contention is the injunction—do they ask for injunctive relief against them for making any sort of a loan to anybody, or just that transaction?

Mr. Dickerson: No loans to anybody within that area.

Mr. Churan: Any restricted property within the area, that is all. That is what the injunction covers; no one else.

Mr. Dickerson: Just so I understand.

Mr. Churan: And they are not in because they are privies to the contract. They are in because of the fact that they are——

Mr. Shannon: In the conspiracy.

Mr. Churan: In the conspiracy, in violation of the contract. That is the reason the Supreme Liberty Life Insurance Company is in.

Mr. Dickerson: I want to ask the Court another question.

The Court: Is it not your contention if an application is made for a loan by someone who lives in the district, they could not make the loan to that person in that district?

Mr. Shannon: Oh, no.

Mr. Churan: Of course not.

The Court: Is that what you had in mind?

Mr. Dickerson: I had in mind that——

The Court: There was something in the brief about the Supreme Liberty being in the business of loaning money, [fol. 274] that they had no right to any permanent injunction against them from doing that; and in that same connection your argument was this real estate man has a license to conduct real estate business, and he should not be enjoined from practicing it because that is his means of livelihood.

Mr. Shannon: We will try and cover that in the decree so that it won't have any such general suggestion.

The Court: Well, now, let's make it as clean cut as we can, so we won't have to continue these sessions and objections to its form and to its being too comprehensive.

Mr. Churan: That is right.

Mr. Dickerson: Any thing you enter in the decree will be of displeasure and distaste to us, anyway.

Mr. Churan: Of course.

The Court: That is one of the things the Judge has to do.

Mr. Mollison: Your Honor, one or two more things there. First, there wasn't any evidence in the record with reference, and no proof at all with reference to any conspiracy of Burke and Katz. They allege that in the complaint, but there was not a scintilla of proof on that. And as to Katz, the injunction is bound to fall, because they would have to prove conspiracy. They did not put on one single scintilla of proof, there was no connection absolutely of any manner of conspiracy between Katz and Burke. It was merely urged in the complaint. Absolutely none.

Mr. Churan: He was the one——

[fol. 275] The Court: What was Katz' testimony? As I remember his testimony, it wasn't very satisfactory and convincing. Now, I would like to have the record on that so as to refresh my mind to answer your question.

Mr. Mollison: Just a minute.

The Court: As I remember, there was considerable testimony he was mixed up with it.

Mr. Churan: Certainly, certainly.

Mr. Mollison: If your Honor please, what I am saying is this. I am now addressing myself to the question of the proof of conspiracy between Burke and Katz, and what I am calling your attention to is this, that not any proof whatsoever was adduced by the plaintiff to cover any conspiracy of Katz whatsoever, between——

Mr. Churan: We did not try to prove a conspiracy.

Mr. Mollison: —between Burke and Katz. That is what your bill is based on.

Mr. Churan: Our bill is based on——

Mr. Mollison: Conspiracy between Burke and Katz.

Mr. Churan: Our bill is based on——

Mr. Mollison: Just a minute.

Mr. Churan: Please give me a chance to answer.

Mr. Mollison: You say, the complaint is a double complaint. One of them is against Hansberry and——

The Court: Well, let's see what the decree provides.

[fol. 276] Mr. Dickerson: May I say just this one thing as to the Supreme Liberty? The Court holds the Supreme Liberty liable as a defendant because, as you said, of a fraud between Burke and the Company. Under no other theory could it be sustained. That is admitted by counsel.

Mr. Churan: Just a minute. If the Court please, I don't admit that.

Mr. Dickerson: Certainly not as a person within the class of representative suits. Now, if the Court please, if you recall the testimony at all, you will recall there is not one bit of testimony on the record of any suit connecting Burke with the Supreme Liberty Life Insurance Company with respect to the making of these mortgages.

The Court: I think admittedly Burke himself, perhaps, had no immediate contact with the Supreme Liberty, but I think there is a chain of circumstances and a sequence of events which connects one with the other.

Mr. Dickerson: Oh, so the inference is drawn from the facts proven?

The Court: I think the inference is inescapable.

Mr. Churan: Certainly. How about Pace?

The Court: That is all, just one program. Just as Burke said, "I am going to do it," and he did do it; and all those events transpired almost simultaneously.

Mr. Dickerson: Even though there is no direct connection, your Honor?

The Court: You know, off the record—well, I won't commit myself.

Mr. Mollison: There is one other thing. The Court un-

[fol. 277] questionably found the covenant was never signed up by more than fifty-five per cent.

The Court: That is right.

Mr. Churan: The Court didn't.

Mr. Mollison: That is the finding of the Court, that it

never was validly entered into by the owners of ninety-five per cent of the frontage, but fifty-five per cent.

Mr. Shannon: If it wasn't an estoppel by res judicata.

Mr. Mollison: The evidence is uncontradicted, the Court said.

Mr. Stradford: If the Court please, just one other thing. I think we ought to have some idea as to when this decree will be ready.

The Court: Mr. Churan, how soon can you prepare this decree? In a week?

Mr. Churan: I think so. I will submit it to counsel.

Mr. Mollison: I will be gone for ten days. I wouldn't want him to present it to you before we get a chance to see it. I want to show the Court the record as to Katz.

Mr. Churan: I will give you a copy, Mr. Mollison.

Mr. Stradford: Why not a week from today?

Mr. Churan: That is too long.

(Here follows further discussion as to the adjournment date.)

Whereupon an adjournment was taken by the Court until Friday, July 1, 1938, at two o'clock p. m.

[fol. 278] EXHIBITS

Plaintiffs:

No. 1. Affidavit of Charles A. Churan, sworn to on the 5th day of March, 1938. 700-2

2. Notice to produce deeds and documents to C. Francis Stradford. 703-6

3. Certified copy of the transcript or deed from Paul Greenhut and Rose Greenhut, his wife, to Eva Somerman. 709-11

4. Warranty deed from Paul Greenhut and Rose Greenhut, his wife to Eva Somerman. 713-16

5. Restrictive Agreement and purported signatures.

5A. Acknowledgments of signatures of restrictive agreement (Helman). 1262-1356

5B. Acknowledgments of signatures of restrictive agreement (Davison). 1357-1430

5C. Parcel Number and owners of said property. 1431-1453

6. Certified copy of quit-claim deed from Eva Somerman and Sam Somerman to Joseph D. Stoltz. 720-723

7. Certified copy of a deed from Joseph D. Stoltz to the First National Bank of Englewood. 734-737

8. Notice to counsel, Arthur A. Basse, asking him to produce a deed from the First National Bank of Englewood to Jay B. Crook. 739-740

9. Deed from the First National Bank of Englewood, a corporation to Jay B. Crook. 742-745

10. Notice to Truman K. Gibson, Jr., and Earl B. Dickerson, asking to produce trust deed from Crook to Chicago Title & Trust Company and other papers and documents. 795-7

[fol. 279] 11. Trust deed from Jay B. Crook and Hallie C. Crook to the Chicago Title & Trust Company. 800-805

12. Installment note of Jay B. Crook and Hallie C. Crook, dated May 19, 1937, for $4,400.00, payable to bearer. 1146-51

13. Deed from Jay B. Crook and Hallie C. Crook to Carl A. Hansberry and his wife Nannie L. Hansberry. 810-813

14. Contract between Lutz and Harrower. 822

15. Certified copy of deed from Walter J. Harrower and Sarah M. Harrower, his wife. 824-27

16. Quit-claim deed from Henry Aloysius Lutz and Elizabeth M. Lutz, his wife, to Edward E. Parrish, conveying the property at 413 East 60th Street. 829-32

17. Trust deed from Edward E. Parrish and Aeolian H. Parrish, his wife. 834-40

18. Principal note, executed April 22, 1937, by Edward E. Parrish and Aeolian H. Parrish for $3,500.00

19. Certified copy of deed from Edward E. Parrish and his wife to Harry H. Pace. 843-47

20. Original escrow agreement, Chicago Title & Trust Company, Escrow No. 106146. 918

21. Copy of letter sent to Chicago Title & Trust Company by Mr. Anderson, informing Chicago Title & Trust Company not to deliver the deed under said escrow and not to consummate said escrow. 926

22. Receipt for $225.00 from James Joseph Burke for Commission. 1018

23. Map showing Washington Park District.

24. Certified copy of a deed from Laura Stebbings to Israel Katz. 1030-33

[fol. 280] 25. Writ of assistance issued against Hansberry and Hoffman. 1051

26. Abstract of records in the case of Plath vs. Delaunty, Ruth Hoffman. 1057-73

27. Bill for injunction and answers in the case of Burke vs. Kleiman. 1160-1204

28. Opinion of the court in the case of Burke vs. Kleiman. 1206-18

29. Affirmance in the case of Burke vs. Kleiman. 1221

30. Agreed facts in the case of Burke vs. Kleiman. 1225-30

31. Decree in the case of Cook vs. Yondorf. 2192

32. Decree in the case of Penoyer vs. Cohn. 2204

EXHIBITS

Defendants:

1. Defendant's Exhibit 1 is a reproduction from a tracing made in the legal course of business purporting to be a plat covering among other Sections, the Washington Park Subdivision. (Permanent record of the Map Department.)

2. Blue print of the East half of the Southeast Quarter of Section 15, Township 30, North 14, comprising 80 acres of land running from 59th to 63rd streets. 1500

3. Blue print of the West half of the Southeast Quarter of Section 15, 38, 14, running from 59th to 63rd and from St. Lawrence to South Park. 1501

4. Blue print of the East half of the Southwest quarter including the streets from 59th to 63rd and South Park to Indiana Avenue. 1502

[fol. 281] 5. Print of the particular section between 60th and 63rd on both the west and east sides of South Park Avenue over to Cottage Grove Avenue. 1503

6. Compilation of all the frontages on the streets between the territory known as 60th to 63rd, South Park to Cottage Grove, including the West side of South Park, and shows the total number of feet involved. 1517

7. Photostatic copy of the By-Laws of the Supreme Liberty Life Insurance Company, beginning with Article 3, Sections 1, 2, 3, 4, and 5. 1542

8. Photostatic copy of the entire minutes of the Executive Committee of the Supreme Liberty Life Insurance Company as of April 15, 1937. 1548

9. Photostatic copy of the minutes of the Executive Committee held on Wednesday, May 12, 1937. 1544

10. Photostatic copy of the ledger sheet of the mortgage record of the Edward E. Parrish mortgage. 1628

11. Photostatic copy of ledger sheet on the property at 6140 Rhodes Avenue. 1632

12. Series of maps showing the lots in each block in the purported restricted area together with the names of the owners of record as of February 1, 1928. 1656

13. Separate series of maps or drawings that are the same as the drawings for the total owners. Red areas indicate those areas in which no purported signatures appeared in Plaintiffs' Exhibit 5. 1663

14. Separate compilation of the black shaded areas, the so-called doubtful areas. 1663

15. Summons in the case of Burke vs. Kleiman. 1738

[fol. 282] 16. Summons in the case of Burke vs. Jas. L. Hall and Chas. J. Sopkin. 1739

17. Appearance filed by Chas. J. Bopkin in Burke vs. Kleiman, et al. 1739

18. Shows the location of the Negro residential areas in Chicago and the population. 1902

19. Certified copies of the conveyance for the doubtful properties, 43 copies, taken under the seal of the Recorder of Deeds of Cook County, Illinois. 1928-2091

20. Certified copy of the complaint, the case of Anderson vs. Hansberry 37S 7357. 2095

21. Summons marked and received in evidence. 2104

22. Opinion rendered by the Appellate Court of Illinois in the Plath vs. Delanty. 2110

23. Certified copy of certain pleadings in Transcript of Record filed in the Appellate Court of Illinois, First District, in Appeal from Decree in Burke vs. Kleiman, the same being original pleadings filed in lower Court, to wit: certain stipulations, exceptions to Answers, indicating precise question litigated to be changed in neighborhood and abandonment of agreement. 2116

[fol. 283] AFFIDAVIT OF FRED L. HELMAN, FILED IN SUPPORT OF THE MOTION TO VACATE AND SET ASIDE THE DECREE AND FOR A NEW TRIAL APPEARING ON PAGE 125 OF ABSTRACT, REC. 614-27

Affiant was Executive Secretary of the Woodlawn Property Owners' Association from the year 1926 until about April or May 1933; the purpose of the Woodlawn Property Owners' Association was fundamentally to create and enforce a restrictive agreement in the area involved in this case; that he had active charge and personal supervision of the work and activity of creating, obtaining or "putting on" a restrictive agreement, and actively participated in the said work of canvassing the area for the purpose of obtaining signatures to the restrictive agreement; that affiant, as Executive Secretary of the Woodlawn Property Owners' Association, had personal supervision and direction of Joseph P. Sheedy and Arthur James Davison, two Notaries Public, who assisted the affiant Helman in the work of obtaining signatures from property owners in the area involved.

The procedure and method used was to obtain from the Chicago Real Estate Board the list of owners in a certain

block or blocks, and the canvassing of the buildings in the various blocks by the affiant and the Notaries, Sheedy and Davison, for the purpose of securing signatures, the canvassers checking the name of the reputed owner with the name of the owner on the sheet or list of owners previously prepared by the affiant from the records of the Chicago Real Estate Board; that the work of canvassing or soliciting for signatures to the restrictive agreement involved herein, [fol. 284] was done by the affiant and the two notaries, Sheedy and Davison; that two or three months prior to February 1, 1928, great difficulty was experienced by the canvassers in securing signatures of the property owners, and it was thought best to record the agreement, together with such names and signatures as had already been secured; that the instrument was assembled, and on February 1, 1928, recorded in the office of the Recorder of Deeds in Cook County, Illinois, as Document Numbers 9914711, 9914712, 9914713 and 9914714; the recorded instruments were then placed in the files of the Woodlawn Property Owners' Association; thereafter, affiant recorded Document No. 10244725.

About a year after February 1, 1928, the affiant Helman, the Executive Secretary of the Woodlawn Property Owners Association, commenced a check-up and investigation of the instruments or purported restrictive agreement recorded as aforesaid; that he examined the original written notes, records, entries and notations made by him and the Notaries Sheedy and Davison, who worked under his personal supervision; that he compared said lists, records, work-notes, entries and notations with the records of deeds, indices, indexes and various other records of the office of the Recorder of Deeds of Cook County, for the purpose of determining whether the aforesaid recorded instruments constituted a valid and enforcible restrictive agreement according to its own terms, and for the purpose of determining whether the necessary frontage consent had been obtained from the owners of 95% of the frontage of the area.

Affiant Helman found the following to be the facts:

[fol. 285] Of a total of 591 parcels of property in the said district, there were 50 parcels of property described in the restrictive agreement which were not signed for by any person or persons; of 559 parcels listed in the restric-

tive agreement, 16 parcels were not signed for by any person or persons and the frontage of said 16 parcels was 863 feet; of the 541 parcels purporting to be signed, there were 16 parcels of property signed by persons other than the title holders, and the total frontage of the said 16 parcels was 806 feet; of the 541 parcels purporting to be signed, there were 64 parcels of property owned by husband and wife in which the husband signed the name of his wife or the wife signed the name of the husband without any written power of authority; the total frontage of the 64 parcels of property improperly signed for by husband or wife, constituted a frontage of 2619 feet; as a consequence of his investigation, the affiant Helman, the Executive Secretary of the Woodlawn Property Owners' Association found that 96 parcels of property had not been properly signed for; that the total frontage of the aforesaid 96 parcels was 4288 feet; that the 96 parcels not properly signed for by any owner or owners, constituted 17.17% of the total number of parcels and 19.32% of the total frontage, not taking into account whether said land lots had frontage for building entrances on streets around the corner, and not taking into account the frontage of the Austin O. Sexton School, the total frontage of the area was 25,740 feet.

As a result of his investigation, the affiant Helman, therefore, found that the restrictive agreement was signed and [fol. 286] executed by less than 80% of the total frontage by ownership of the said area, and that the condition precedent contained in said restrictive agreement was never complied with, and that the restrictive agreement was never in fact entered into, and never became of any force or effect according to its own terms; it was the obvious intention of the said property owners of said area that the agreement should not be of any force or effect until or unless the owners of 95% of the frontage of the area had signed and executed said restrictive agreement; that the restrictive agreement was invalid and void because the condition precedent was never complied with.

The affiant Helman was the Executive Secretary of the Woodlawn Property Owners' Association at the time of the filing of the case of Burke v. Kleiman, Case No. 567687 in the Superior Court of Cook County, Illinois; that as Executive Secretary of the said association, he conferred with various officials of the association in regard to the

filing of said case; that he directed or caused to be paid to the attorneys representing Olive Ida Burke, the court costs for the filing of said case and generally supervised the prosecution of said case up to the time when he severed his connection with said association in about April 1933.

Subscribed and Sworn to by the said Helman on the 16th day of August, A. D. 1938.

CLERK'S CERTIFICATE

Certificate by John E. Conroy that he is Clerk of t' Circuit Court of Cook County and keeper of records and files of said court, and certifying that the above and foregoing is a true, perfect and complete transcript of the record according to Praecipe for Record filed herein in [fols. 287-288] three volumes, Vol. 1, 2, and 3.

Respectfully submitted,

Earl B. Dickerson, Truman K. Gibson, Attorneys for Supreme Liberty Life Insurance Company, a corporation, and Harry H. Pace, Defendants; C. Francis Stradford, Attorney for Carl A. Hansberry and Nannie L. Hansberry; Loring B. Moore, Attorney for James Joseph Burke, Defendant; Irvin C. Mollison, Attorney for Israel Katz, Defendant.

[fol. 289] [File endorsement omitted.]

[fol. 290] IN SUPREME COURT OF ILLINOIS, APRIL TERM, A. D. 1939

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, LOUISE G. ANDERSON, Lyman M. Anderson and Kathryn Luttrell, Appellees,

vs.

CARL A. HANSBERRY, NANNIE L. HANSBERRY, JAMES JOSEPH BURKE, Harry H. Pace, Supreme Liberty Life Insurance Company, a Corporation, Israel Katz, Appellants

Appeal from Circuit Court, Cook County

Honorable George W. Bristow, Judge Presiding

Additional Abstract of Record—Filed April 8, 1939

Plaintiffs deem the defendants' Abstract of Record so incomplete and insufficient that it is necessary to prepare and file an Additional Abstract of Record.

June 15, 1937, order cause transferred to Judge Michael Feinberg.

OPINION

Opinion of Appellate Court of Illinois, First District (Justice McSurely) case No. 39368 sustaining Circuit Court order declaring lease for 547 East 60th Street, Chicago, to Ruth Hoffman void, among other things, finding "it is also alleged that the lease was obtained through misrepresentation and fraud."

ORDER GRANTING CHANGE OF VENUE

Order entered October 21, 1937, granting defendants application for change of venue from Judge Feinberg and cause transferred to Executive Committee.

[fol. 291] Order entered by Executive Committee October 22, 1937, assigning said cause to Judge George W. Bristow.

MANDATE

Mandate from Appellate Court affirming interlocutory order for temporary injunction filed November 10, 1937.

Affidavit of CHARLES A. CHURAN filed November 15, 1937, in opposition to motion to dissolve temporary injunction, alleges, (among other things):

Affidavit

Charles A. Churan, being first duly sworn upon his oath says that he is one of the attorneys for the plaintiff in above cause; that he has resided in the Washington Park Subdivision for nearly twenty (20) years last past, that affiant's wife is the owner of sixty (60) feet of frontage in said subdivision, improved with a two-apartment residence on one lot; that affiant and his wife both signed said restrictive agreement and affiant is thoroughly familiar with the properties in said subdivision; that said restricted area, with the exception of part of 61st Street, is an improved, residential area, consisting of about seventy-five per centum (75%) of two-apartment residences, and about twenty-five per centum (25%) of larger apartment buildings; that affiant and his wife have been members of the Woodlawn Property Owners Association ever since said agreement was signed and recorded; that when said signatures were being obtained, a large wall-map or chart, showing dimensions of lots and blocks, was kept in the office of the Woodlawn Property Owners Association, and as the signatures were obtained, the lots signed up were colored with colored crayon; that [fol. 292] the work of obtaining the signatures commenced in the fall of 1927 and that in the latter part of January, 1928, said agreement was signed by the owners of more than ninety-five per centum (95%) of the frontage described in the complaint; that affiant was present at regular monthly meetings of said association, held during the time that said signatures were being obtained; that he has been the attorney for said Woodlawn Property Owners Association since June, 1933, and was secretary of said association for two (2) years; that said recorded restrictive agreement of the Washington Park Subdivision, recorded February 1, 1928, shows five hundred and fifty-nine (559) parcels signed up and another agreement which has inadvertently been omitted from the complaint in this cause, and which was recorded December 28, 1928 as Document No. 10244725, shows four (4) additional parcels, including the Washington Park Hospital property which has a frontage of two hundred and fifty-one (251) feet on Vernon Avenue and two hundred and twelve (212) feet on East 60th Street; that said restricted area consists of nineteen (19) whole city blocks, and six (6) half city blocks improved by substantial brick and stone residences and apartment buildings with trees and

parkways on the street fronts of Evans, Langley, Champlain, St. Lawrence, Rhodes, Eberhart, Vernon, South Park Avenues and 60th and 62nd Streets and a few stores on 61st Street; that said district, with the exception of 61st Street, is zoned by the City of Chicago for residence purposes; that 63rd Street and Cottage Grove Avenue is, by the terms of said agreement, not included in said restricted area.

Affiant further says that he was one of the attorneys in the case of Burke v. Kleiman which involved this very agree-[Vol. 293] ment, and which was an action by Olive Ida Burke in the Superior Court, General No. 567687 to enforce this identical restriction agreement against property at 417 E. 60th Street, Chicago, in which a decree was entered in 1933 and affirmed in the Appellate Court of Illinois, First District, on November 27, 1934; that by said decree said restriction agreement is res adjudicata, and declared by the Appellate Court to be in full force and effect; that since said decree was affirmed in the Appellate Court, there have been but four (4) violations of said restrictive agreement, two (2) of which four (4) violations have been perpetrated by the defendants, Carl A. Hansberry and Nannie L. Hansberry, and one by the defendant, Harry H. Pace, as alleged in the complaint in this cause.

Verified November 10, 1937.

Affidavit of GEORGE W. COOK filed November 15, 1937, in opposition to motion to dissolve temporary injunction, alleges, (among other things):

George W. Cook, being first duly sworn upon his oath says that he resides at 6006 Eberhart Avenue, Chicago, Illinois, and is the owner with his son and wife of two (2) six-flat apartment buildings located on Vernon Avenue, between 60th and 61st Street-, Chicago, in what is known as the Washington Park Subdivision; that affiant is a signer of the Restrictive Agreement sought to be enforced in this cause; that affiant has been a director for many years of the Woodlawn Property Owners Association, an association consisting of about twelve hundred (1200) members, who are owners of property in said Washington Park Subdivision and in Woodlawn, which adjoins said Washington Park Sub-

division on the East; that said Woodlawn is also restricted [fol. 294] against colored occupancy and ownership by several restrictive agreements substantially similar to the Restrictive Agreement in this cause; that said Woodlawn Property Owners Association was and is a property owners improvement club, and one of its objects is the enforcement of said restrictive agreements.

Affiant further says that he with others was engaged in securing of signatures of property owners to said restrictive agreement involved in this proceeding, which securing of signatures commenced in September A. D., 1927, and continued until the same was signed by five hundred and sixty-three of the owners of more than ninety-five per centum (95%) of the frontage covered by said restrictive agreement; that a map or chart of the Washington Park Subdivision was kept in the office of the said Woodlawn Property Owners, which was located on 61st Street between Vernon Avenue and Eberhart, just around the corner where affiant's property is and was located; that said chart showed the frontage of each piece of property in the subdivision and that affiant personally kept a constant check on the said chart as the signatures to the restrictive agreement were secured, and that each property on said chart was marked with colored crayon, when the signatures of the owners were secured, that he knows positively that the owners of more than ninety-five per centum (95%) of the frontage described in said agreement by careful measurements then made, signed and executed said restrictive agreement involved in this cause, before the same was recorded on February 1, A. D. 1928; that before said agreement was recorded a mass-meeting of the signers of said agreement was held, at which a verification was made that more than ninety-five per [fol. 295] centum (95%) of the frontage described in said agreement had been secured, and a resolution was passed to this effect in the minutes of said Woodlawn Property Owners Association.

Affiant further says that ever since the recording of said agreement, which covers nineteen (19) whole city square blocks and six (6) half city blocks, and up to about May 1, A. D. 1937 all of said subdivision, with the exception of ten (10) or eleven (11) parcels of property on South Park Avenue between 60th and 61st Streets and two (2) buildings on 60th Street, between South Park and Vernon Avenues, have been owned and occupied by white persons; that the Asso-

ciation was successful in the case of Burke v. Kleiman in obtaining a decree in the Superior Court of Cook County against one of the two (2) buildings on 60th Street which was affirmed by the Appellate Court and the tenants were dispossessed; that proceedings are now pending against six (6) of the ten (10) or eleven (11) parcels on South Park Avenue, and agreements made with the owners of the others to change back to white ownership as soon as the cases against the six (6) pending cases are disposed of; that outside of these violations and the occupancy by defendant Hansberry of one flat of a three-apartment building at No. 549 E. 60th Street, from which he was ordered to move by a decree of this court and a residence at 413 E. 60th Street occupied by the defendant, Harry H. Pace since May, 1937, against which property an action is pending in the Superior Court to vacate his property, and the premises involved in this proceeding all of the other properties of about five hundred and fifty (550) or more parcels have been and are now owned and occupied by white persons.

[fol. 296] Verified November 10, 1937.

OBJECTIONS OF PLAINTIFFS FILED NOVEMBER 15, 1937, TO ANSWER OF DEFENDANTS, CARL A. AND NANNIE L. HANSBERRY

Among other things the objections recite:

Now come the plaintiffs by Charles A. Churan and Schuyler & Hennessy, their attorneys, and object to the answer of the defendants, Carl A. Hansberry and Nannie L. Hansberry, his wife, for the following reasons, to-wit:

First: It is alleged in paragraph 8 of the plaintiffs' complaint that "said restrictive agreement was decreed by the Superior Court of said County in the case of Olive Ida Burke v. Isaac Kleiman, General No. 567687 to be in full force and effect, which decree was affirmed by the Appellate Court of Illinois, First District, on November 27, 1934."

This allegation in the complaint is not answered, and plaintiffs contend that by reference to the record in said Appellate Court in said cause of Burke v. Kleiman, it appears that said cause was a representative action brought by the then plaintiff, Olive Ida Burke, "on behalf of herself

and on behalf of all other property owners in the district covered and affected by said agreement, who are, or whose grantors, direct or otherwise, were parties to said indenture," and that therefore the decree in said cause of Burke v. Kleiman is res adjudicata as to the validity, force and effect of said agreement.

Second: The Appellate Court of Illinois, First District, on appeal of said defendants, Carl A. Hansberry and Nannie L. Hansberry and others by its opinion in this cause, filed October 7, 1937 and in which rehearing was denied on [fol. 297] October 22, 1937 and mandate of the Appellate Court filed herein, found as follows: "the validity of the restrictive agreement in question was upheld by another division of this court. Burke v. Kleiman, 277 Ill. App. 519." That by said findings of the Appellate Court the question of the validity of the restrictive agreement is res adjudicata.

Third: In view of the decisions of the Appellate Court on the validity of said restrictive agreement, the denials of said defendants in paragraphs 3, 6, 8, 9, 10, 11, 12, 13, 16 and 17, and each of them are insufficient in law as a defense to said action.

Fifth: Defendants do not answer the allegation in the 6th paragraph of said complaint that said deed from the First National Bank of Englewood was escrowed with the Chicago Title and Trust Company was not delivered to defendant, Jay B. Crook until May 26, 1937, or as to the execution of the Trust Deed from said Crook to the defendant, Supreme Liberty Life Insurance Company, of which defendant, Harry H. Pace is secretary, was executed on May 19, 1937, said deed to Crook and the trust deed to the Supreme Liberty Life Insurance Company were recorded simultaneously, nor do they answer that said premises were conveyed by the defendants, Crook to the defendants, Carl A. Hansberry and Nannie L. Hansberry by deeds dated May 27, 1937, nor that the Hansberrys took possession of said premises on May 26, 1937, nor that the Hansberrys are negroes and were occupying said premises on the date the complaint herein was filed.

Sixth: The complaint alleges that said restrictive agreement has been in full force and effect ever since the same was executed and recorded; that same was executed on [fol. 298] to-wit: September 30, 1927 and recorded on Febru-

ary 1, 1928 in books, pages and as documents numbers therein enumerated; that Eva Somerman, the then owner of said premises at 6140 Rhodes Avenue, Chicago, signed said restrictive agreement before recordation thereof; and that said premises were continuously owned and occupied by white persons since the recordation of said agreement until May 26, 1937, when defendants Hansberry moved in and took possession.

The complaint further alleges (paragraph 4) that "it is provided in said restrictive agreement that the covenants, restrictions and agreements therein contained should be binding on and for the benefit of and may be enforced by and against each party thereto, his successors and assigns". This is admitted by said defendants in paragraph 4 of their answer.

The defendants are therefore estopped by the terms of the agreement from setting up any defense that said restrictive agreement has not been in full force and effect, and that same is not binding on the said premises at 6140 Rhodes Avenue, Chicago, or on the defendants, Carl A. and Nannie L. Hansberry.

Seventh: The restrictive agreement as set forth in said complaint provides that said agreement, after recordation thereof, shall be effective "until January 1, 1948, and thereafter until abrogated by written agreement of seventy-five per centum (75%) of the frontage owned by the parties who signed said agreement". By the terms of said instrument and limitation of time, these defendants as successors in title are estopped from setting up any defense that said restrictive agreement can prior to January 1, 1948, be abrogated by them.

[fol. 299] Eighth: These defendants as successors in title are bound by the terms of said agreement and cannot attack the validity of said agreement or the terms thereof.

Ninth: The plaintiffs, for the reasons set forth in the preceding objections, therefore move to strike from paragraphs 1, 3, 6, part of 8, part of 9, all of 10, 11, 12 and 16, all references to the effect that said restrictive agreement was not in full force and effect.

Tenth: For the same reasons to strike out of said last named paragraphs of defendants' answer, all references to the effect that said restrictive agreement is void.

Eleventh: For the same reasons all reference in same paragraphs that the conditions precedent were not complied with.

Twelfth: To strike averments in their answer as to occupation by colored persons outside of the restricted area as immaterial and irrelevant.

Thirteenth: The defendants' answer that said restrictive agreement is unconstitutional and void for reasons alleged in paragraph 16 of said answer, is insufficient, immaterial and irrelevant in law as a defense to said complaint.

Fourteenth: Said answer is otherwise insufficient, immaterial, irrelevant and impertinent as a defense to said complaint.

Wherefore, plaintiffs pray that said plaintiffs' objections to the defendants' answer as to the particulars herein pointed out be sustained.

Signed by attorneys for plaintiffs and verified November 15, 1937.

[fol. 300] ORDER

Order entered November 19, 1937 by Judge Bristow, setting hearing on motion to dissolve injunction and motion to strike answers of defendants for November 26, 1937.

ORDER

Order entered by Judge Bristow December 13, 1937, extending time to file objections and replies to answers of the defendants to and including December 18, 1937 and leave also given plaintiffs, if they so desire, to file one consolidated reply to the separate answers of the defendants.

VERIFIED CONSOLIDATED REPLY OF PLAINTIFFS, FILED BY LEAVE OF COURT DECEMBER 17, 1937, TO THE AMENDED ANSWER OF CARL A. HANSBERRY, NANNIE L. HANSBERRY, JAY B. CROOK AND HALLIE C. CROOK, AND TO THE ANSWERS OF JAMES JOSEPH BURKE, HARRY H. PACE, SUPREME LIBERTY LIFE INSURANCE COMPANY AND ISRAEL KATZ.

So much of said Reply not in defendants' Abstract of Record (Abst. 58-63), as is considered by plaintiffs to be material, is as follows:

For further reply to said defendants' Answers and each of them these plaintiffs say:

1. These plaintiffs deny that there are approximately three hundred (300) to five hundred (500) or more colored persons residing in the alleged restricted area, and deny that said large number of colored persons have been residing in said alleged restricted area for a long period of time, except those properties on South Park Avenue between 60th and 61st Streets as alleged in paragraph 10 of plaintiffs' Complaint; and further state that an action is now pending in the Superior Court of Cook County against the Southway Hotel, and against other properties occupied [fol. 301] by colored persons on that part of South Park Avenue between 60th and 61st Streets, and against the property occupied by defendant Harry H. Pace at No. 413 East 60th Street, Chicago, and further say that none of the properties on South Park Avenue are owned by colored persons or negroes, and the only property within the restricted area owned by colored persons or negroes is the property at 6140 Rhodes Avenue, Chicago, the title to which is of record in the name of the defendants Carl A. Hansberry and Nannie L. Hansberry and the property at 413 East 60th Street, the record title to which is now in defendant Harry H. Pace, but recorded since the filing of the Complaint herein. That aside from the properties on said portion of South Park Avenue alleged in the Complaint herein, the only other property owned by a white person, but occupied by negroes, is a three-apartment building at No. 423 East 60th Street, Chicago, which has never been signed up by said Restrictive Agreement.

2. These plaintiffs deny that the character of the neighborhood in which the premises 6140 Rhodes Avenue, Chicago, are situated, has changed from white to colored, but state the fact to be that both sides of Rhodes Avenue from East 60th Street to East 63rd Street within the restricted area, are occupied and always have been occupied by white persons and have not, since the Restrictive Agreement went into effect (except the Hansberry property) been leased or occupied by colored persons or negroes. That the plaintiffs' properties are located nearly four (4) city blocks from South Park Avenue and from East 60th Street.

[fol. 302] 6. These plaintiffs deny that the signature of said defendant, Israel Katz, to said Restrictive Agreement,

was obtained by a trick, stratagem, misrepresentation or fraud, and further state that said defendant, Israel Katz, for nearly ten (10) years had personal and constructive notice that his property at 6018 Vernon Avenue, Chicago, was covered by said Restrictive Agreement, and acquiesced therein, and has taken advantage of the benefits thereof, and is therefore guilty of laches and thereby estopped from raising said alleged defense.

9. These plaintiffs deny that the suits to enforce said Restrictive Agreement involving buildings and premises on South Park Avenue have not been prosecuted diligently, and deny that any civil injunction suits have been abandoned, and deny that any waivers have been given by the plaintiffs or by persons purporting to act for the plaintiffs or for the Woodlawn Property Owners, but on the contrary state the fact to be that, in addition to the decree in the case of Burke v. Kleiman, hereinafter fully set forth, a decree has been entered in the Superior Court of Cook County in the case of Cook, et al. v. Yondorf, et al., General No. 34S 1261, on October 20, 1936, finding said Restrictive Agreement to be in full force and effect and binding on the signers thereof, their heirs and assigns, but not binding on defendant Yondorf, because he acquired title to the premises involved therein under foreclosure of a mortgage executed prior to the Restrictive Agreement, as will more fully appear from the record thereof, ready to be produced to this Court, and said Restrictive Agreement was also decreed in the case of Penoyer v. Cohn, General No. 34S 16816, of the Superior [fol. 303] Court of said County on May 6, 1936, to be in full force and effect; that both decrees in these cases are res judicata on the question of the validity of said Restrictive Agreement. And these plaintiffs further say that even though some other actions against violations on said South Park Avenue have been delayed by circumstances beyond their control such conditions are no defense to the enforcement of the said Restrictive Agreement by the plaintiffs for their own benefit as the plaintiffs' properties are located nearly four (4) blocks away from any of the violations on South Park Avenue as fully alleged and set forth in the Complaint herein, and by the provisions of the Restrictive Agreement itself.

16. And in further reply to said defendants' Answers, these plaintiffs say that said defendant, Israel Katz and

said defendants, Carl A. Hansberry, Nannie L. Hansberry, Jay B. Crook, Hallie C. Crook, James Joseph Burke and Harry H. Pace, are all persons in privity to the signers of said Restrictive Agreement, as assignees by direct or mesne conveyances of the title of their respective premises from the original signers of said Agreement, and bound thereby.

17. That said defendants, Israel Katz, Carl A. Hansberry, Nannie L. Hansberry, Jay B. Crook, Hallie C. Crook, James Joseph Burke, Harry H. Pace and Supreme Liberty Life Insurance Company are further estopped from denying the execution, delivery, existence, compliance with conditions precedent, validity and enforceability of said Restrictive Agreement by the judgment and decree of the Superior Court of Cook County, Illinois, entered in the case of Olive [fol. 304] Ida Burke v. Isaac Kleiman, Sam Kleiman, James L. Hall and Charles J. Sopkin, individually and as Trustee, General No. 567687, entered on October 2, 1933, and which decree was in all respects affirmed in the Appellate Court of Illinois, First District, on November 27, 1934, in the case entitled, Olive Ida Burke, Appellee v. Isaac Kleiman, et al., Appellants, General No. 37522, reported in the 277 Illinois Appellate Reports, page 519; that said action was filed by said Olive Ida Burke on the 21st day of October, 1932, as a representative or class action on behalf of herself and on behalf of all other property owners in the district covered and affected by the said Agreement, who were, or whose grantors, direct or otherwise, were parties to said indenture and Agreement, and whose property interests would be adversely and injuriously affected by the violation of the covenants and terms of said Agreement. That Olive Ida Burke was then and is now, the wife of the defendant, James Joseph Burke.

Bill of complaint in Burke v. Kleiman, Superior Court, General No. 567687 is in words and figures:

[fol. 305] STATE OF ILLINOIS,
County of Cook, ss:

IN THE SUPERIOR COURT OF COOK COUNTY

Bill for Injunction 567687

OLIVE IDA BURKE, Complainant,

vs.

ISAAC KLEIMAN, SAM KLEIMAN, JAS. L. HALL and CHAS. J. SOPKIN, Individually and as Trustee, Defendants

To the Honorable Judges of the Superior Court of Cook County, Illinois, in Chancery Sitting:

Your oratrix, Olive Ida Burke, respectfully represents unto the Court that she filed this bill of complaint on behalf of herself and on behalf of all other property owners in the district covered and affected by the agreement hereinafter mentioned, and who are, or whose grantors, direct or otherwise, were parties to said Indenture of agreement, and whose property interest will be adversely and injuriously affected by the violation hereinafter mentioned by the said defendants of the covenants and terms of said agreement.

Your oratrix further represents that she is now and has been for more than one year last past a resident of the city of Chicago, county of Cook and state of Illinois; that on, to-wit, the 30th day of September, A. D. 1927, four to five hundred white persons, including one Hannah Studdert, [fol. 306] the owner, at the time of the execution of a certain agreement hereinafter mentioned, of the parcel of land now owned of record by your oratrix and including one Ben Piser, the owner, at the time of the execution of a certain indenture, hereinafter mentioned, of the parcel of land now owned of record by one Isaac Kleiman, hereinafter named as one of the defendants; said four to five hundred persons owning four to five hundred parcels of land, improved by dwelling houses, apartment buildings, and flat buildings situated on Evans Avenue, at Evans, Langley, Champlain, St. Lawrence, Rhodes, Eberhart, Vernon, and South Park Avenues between 60th and 63rd Streets and on 60th, 61st and 62nd Streets between South Park and Cot-

tage Grove Avenues in the City of Chicago, County and State aforesaid, entered into and executed an indenture wherein it is recited that for the best interests of the parties thereto and the property aforesaid therein described, the said persons mutually covenant and agree among other things that no part of their said properties shall ever be used or occupied by, or sold, leased, used, or given to any person of the negro race or blood; and that this covenant should run with the land and bind their respective heirs and assigns until January 1, 1948, and thereafter until said agreement should be abrogated as therein provided, said indenture of agreement defines the term negro as used therein to include every person having one-eighth part or more of negro blood, or having any appreciable admixture of negro blood, and every person who is what is commonly known as a colored person, which said agreement is in words and figures as follows, to wit:

"This Agreement entered into this 30th day of September, 1927, by and between the undersigned owners of land [fol. 307] on the one or the other side of Evans, Langley, Champlain, St. Lawrence, Rhodes, Eberhart, Vernon and South Park Avenues between 60th and 63rd Streets and on 60th, 61st and 62nd Streets between South Park and Cottage Grove Avenues, in the City of Chicago, Witnesseth, that,

And Whereas, the parties hereto feel that the restrictions and covenants hereinafter imposed and created are for the best interests of all of the parties hereto and of the property hereinafter described.

In Consideration of the premises and of the mutual covenants hereinafter made, and of the sum of Five Dollars ($5.00) in hand paid to each of the parties hereby by each of the other parties hereto, the receipt of which is hereby acknowledged, each party as owner of the parcel of land above described immediately under his name, does hereby covenant and agree with each and every other of the parties hereto, that his said parcel of land is now and until January 1, 1948, and thereafter until this agreement shall be abrogated as hereinafter provided, shall be subject to the restrictions and provisions hereinafter set forth, and that he will make no sale, contract of sale, conveyance, lease or agreement and give no license or permission in violation of such restriction or provisions, which are as follows:

1. The restriction that no part of said premises shall in any manner be used or occupied directly or indirectly by any negro or negroes, provided that this restriction shall not prevent the occupation, during the period of their employment, or janitors' or chauffeurs' quarters in the basement or in a barn or garage in the rear, or of servants' quarter by negro janitors, chauffeurs or house servants, [fol. 308] respectively, actually employed as such for service in and about the premises by the rightful owner or occupant of said premises.

2. The restriction that no part of said premises shall be sold, given, conveyed or leased to any negro or negroes, and no permission or license to use or occupy any part thereof shall be given to any negro except house servants or janitors or chauffeurs employed thereon, as aforesaid.

The covenants, restrictions, and agreement herein contained shall be considered as appurtenances to and running with the land, and shall be binding upon and for the benefit of each party hereto and may be enforced by any of the parties hereto by any permissible legal or equitable proceedings, including proceedings to enjoin violation and for specific performance; provided, however, that in any action brought to set aside any deed made in violation of any of the provisions of this agreement, it shall be a good defense thereto that prior to the institution of each suit, the title to the premises then in question had become vested in, and was then owned by a corporation or a white person, for value; and provided, further, that the lien of no mortgage or trust deed in the nature of a mortgage shall be impaired or invalidated by reason of the breach of any of the provisions of this agreement, whether any such breach shall have occurred prior or subsequent to the recording of any such mortgage or trust deed; and provided, further, that nothing contained in the foregoing provisos shall in any manner impair the right of any person or persons interested to enforce at all times and against all persons the restrictions in this agreement contained prohibiting the use or occupa- [fol. 309] tion of all or any part of said premises by a negro or negroes.

This Agreement and the restrictions herein contained shall be of no force or effect unless this Agreement or a substantially similar agreement shall be signed by the owners above enumerated of ninety-five per centum of the front-

age above described, or their heirs or assigns, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31, 1928. Provided, however, that if the owner of any of said parcels or of any part thereof shall be under disability as, for example, when the title is held, without such power, by testamentary trustees or other fiduciaries, the frontage as owned shall be treated as though the owners thereof had power to sign, and has signed this agreement, for the purpose of determining whether this agreement becomes effective or not under the provisions of this paragraph.

It is understood that for convenience a number of counterparts or concurrent instruments have been prepared of even date herewith, the text of each of which is substantially the same as that of this instrument, and that the execution of any one of such instruments shall have the same effect as the execution of this instrument by the same person would have, and it is understood that parties to this agreement shall include not only those persons who shall sign this instrument but also all persons who shall sign any of said counterpart or concurrent instruments, and that this instrument and all of said counterpart, or concurrent instruments shall constitute one agreement. It being contemplated that changes in ownership may occur between the [fol. 310] date which this instrument bears and that date when it shall become effective, or that there may possibly be some mis-recital of ownership herein contained, it is further understood that the execution hereof by the person who shall be the owner of any of said parcels of land at the time of such execution shall have the same effect as though such person had been the owner thereof on the date hereof and was so described herein, whether the recital of ownership herein contained be made to conform to the facts at the time of execution or not. And if, in order to conform to the facts as to ownership at the time of execution, the recital of ownership in any of said instruments shall be made different from that contained in the others, that difference shall not prevent all of such instruments from being construed to be substantially similar to each other.

No restriction imposed hereby shall be abrogated or waived by any failure to enforce the provisions hereof no matter how many violations or breaches may occur.

This agreement and the restrictions herein expressed may be abrogated at any time on or after January 1, 1948, by

the written agreement of the owners of seventy-five per centum of the frontage owned by the parties who shall sign this agreement, as herein set forth, such abrogation to be effective from and after the date of delivery and recording of such written agreement, Provided, however, that if the owner of any of said parcels or any part thereof shall be under disability, as for example, that of minority, or for any other reason shall not have the power to execute such abrogation agreement, as for example, when the title is held [fol. 310½] without such power, by testamentary trustee or other fiduciaries, the frontage so owned shall be treated as though the owners thereof had power to sign, and had signed such abrogation agreement, for the purpose of determining whether such abrogation agreement becomes effective or not under the provisions of this paragraph.

The invalidity of any restrictions hereby imposed, or of any provision hereof, or of any part of such restriction or provision shall not impair or affect in any manner the validity, enforceability or effect of the rest of this agreement.

Pronouns herein employed in the masculine gender shall be construed to include the feminine and neuter genders, and the word "Party" or "persons" to include natural and artificial parties or persons.

The term "negro" as used herein shall include every person having one-eighth part or more of negro blood, or having any appreciable admixture of negro blood, and every person who is what is commonly known as a colored person.

In any case where there is a recorded lease of any parcel of the property described herein for a term ending more than five years after any given date the owner of the reversion and the owner of the leasehold estate together shall be deemed to be the owners of such parcel on such given date within the meaning of this contract, and whenever the signature of the owner of such parcel shall be required on such given date under the provisions whatever interest any signer of this instrument owns in any of said property shall be bound by the provisions hereof. Leases under unrecorded leases on any given date and under leases for terms [fol. 311] ending less than five years after such given date shall not be regarded as owners within the meaning of this contract.

The undersigned spouses of owners of land herein described join herein for the purpose of signifying their assent

ereto and of subjecting their rights of dower, if any, to he restrictions and provisions imposed hereby.

Time is of the essence of this contract and all the terms, onditions and provisions hereof.

The covenants, restrictions and agreements herein contained, shall be binding on, and for the benefit of, and may e enforced by and against each party hereto, his successors nd assigns, and the heirs, executors, administrators and uccessors of them respectively.

In Witness Whereof, the parties hereto have hereunto et their hands and seals the day and year first aforesaid."

3. Your oratrix further represents that said agreement vas signed by the owners of ninety-five per centum of the rontage described therein, and duly recorded in the office f Recorder of Deeds, Cook County, Illinois, on, to-wit: February 1, A. D. 1929, in Book of Records No. 25525, Page , as Document No. 9914711, being all of said agreement, xcepting the signatures and notarizations, which were on he date aforesaid duly recorded in said office as other parts f said document as Documents Nos. 9914712-3-4, respecively, thereby complying in all respects to the conditions n said indenture contained and among those so signing vas a certain Hannah Studdert, then owner of the parcel ow owned by your oratrix, Olive Ida Burke, whose parcel vas identified, described and designated among the parcels fol. 311½] of the respective subscribers to said indenture f agreement as Parcel No. 498 and said agreement was lso signed by Ben Piser, the owner at the time of the real state hereinafter described, which real estate was identified nd described as Parcel No. 472, and the said Ben Piser was t the time of execution by him of said indenture of agreeent as aforesaid fully competent and of a capacity to exeute the same and under no disability whatsoever. And our oratrix avers that all conditions provided by said indenture for the purpose of determining whether said agreeent became effective or not were fully performed and comlied with and said agreement became effective on, to-wit, he first day of February, A. D. 1928, and has been effective rom thence hitherto and is now in full force and effect.

4. Your oratrix further represents that the said Hannah Studdert after the execution of the said indenture of agreeent sold and conveyed the said real estate designated and escribed as Parcel #498, and thereafter by mesne convey-

ances your oratrix became the owner of said real estate designated and described as parcel #498.

5. Your oratrix further represents that the said Ben Piser after the execution of the aforesaid indenture of agreement sold and conveyed the real estate designated and described as parcel #472 and thereafter by mesne conveyances the said defendant, Isaac Kleiman, became the owner of record of said real estate designated and described as parcel #472, and the said defendants, Sam Kleiman, Jas. L. Hall, and Chas. J. Sopkin, individually and as trustee, or some of them, have, or claim to have, some lien or right, title or in- [fol. 312] terest in the ownership of the real estate last aforesaid, the nature and extent of which is unknown to your oratrix and the said defendants, Isaac Kleiman, Sam Kleiman, Jas. L. Hall and Chas. J. Sopkin, individually and as Trustee, or some of them, were in full operation, control and management of the said premises so described as parcel #472 on to-wit: the 18th day of October, A. D. 1932, and the defendant, Isaac Kleiman, then knew and had full knowledge and notice, and had full knowledge and notice at the time of their acquirement of said real estate and the title thereto, as aforesaid, of the said agreement and the covenants, conditions and prohibitions therein contained; and the said defendants, Sam Kleiman, Jas. L. Hall and Chas. J. Sopkin, individually and as trustee, had full knowledge and notice at the time of their acquirement of the lien, or right, title or interest, as aforesaid, in the premises, of the aforesaid agreement and the covenants, conditions and prohibitions therein contained. That said parcel #472 is located at, and is known as 417-19 East 60th Street, Chicago, Illinois, and legally described as, to-wit:

Lot five (5) in Block One (1), in John J. Mitchell's South Park Subdivision of Blocks nine (9), ten (10), and eleven (11) in Maher's Subdivision of the South East Quarter (S. E. ¼) of Section fifteen (15) Township Thirty-eight (38) Range Fourteen (14),

and is improved and was then improved with a three-story apartment building and appurtenances containing, to-wit: three apartments. The complainant, Olive Ida Burke, owns the following property known as, to-wit: 6039 Vernon Avenue in the City of Chicago, County of Cook and State [fol. 313] aforesaid, improved with a flat or apartment

building or dwelling, which property is included within the terms of the said indenture and the defendants, Isaac Kleiman, Sam Kleiman, Jas. L. Hall, and Chas. J. Sopkin, individually and as trustee, although knowing of the existence and terms of the indenture when they, or some of them, purchased or took right, title or interest, or lien, as aforesaid, to or on the said parcel of land and at all times thereafter on, to-wit, the 18th day of October, A. D. 1932, and on divers days and dates prior to the filing of this bill, did threaten to and undertake to change the said apartment building from white tenants, or lessees, to colored tenants, or lessees, or some of them, to vacate said premises, well knowing the terms of said agreement, as aforesaid; and the defendants, Isaac Kleiman, Sam Kleiman, Jas. L. Hall and Chas. J. Sopkin, individually and as trustee, or some of them, did on the date last aforesaid, offer for rent, and did rent or lease at least one of the rooms or apartments in said premises to a person of the negro race and did solicit negro tenants, or lessees, and will rent the remaining apartments therein to negro tenants unless they are enjoined and restrained from so doing by the injunction of this Honorable Court.

Your oratrix further represents that the complainant owning property in close proximity to the location of the said apartment building and being a party to the said indenture as aforesaid, protested to the said defendants the said change or attempt to change the tenancy of said apartment building from white persons to colored persons and the accepting of one colored person as a lessee or tenant [fol. 314] or the acceptance of any colored person as lessee or tenant of said premises, but the defendants stated to this complainant that, notwithstanding, they would proceed to rent to persons of negro race; that said protests were made in behalf of complainant and in behalf of other members of said indenture. That said Jas. L. Hall is a negro as defined in said Indenture of agreement and is a tenant in possession of one of said apartments located at 417-19 East 60th Street, Chicago, Illinois.

Your oratrix further represents that all of the said properties are situated within a radius of about one block east or south of the said parcel #472 in the city of Chicago, county and state aforesaid and within the district hereinbefore mentioned; that the use or occupancy of said apart-

ment building being the said improvement on parcel #472 by a person or persons of the negro race as defined in said agreement, will greatly depreciate values in said district included in said agreement to an extent of one million ($1,000,000.00) dollars and upwards, and will cause tenants to vacate complainant's property and the properties of other signers to said indenture and will produce a mixed population in the district with attendant evils, and the properties of your orator and the said other signers of said indenture will greatly suffer thereby and will cause irreparable injury to the complainant and the other parties to the indenture aforesaid; and your orator further represents that by reason of the aforementioned attempt and undertaking, on, to-wit: October 18, 1932, and thereafter, to offer for rent apartments to persons of the negro race or to accept them or any of them as a roomer, lessee, or tenant of said [fol. 315] apartments or either of them, and change the tenancy of said apartments or either of them from white persons to those of the negro race, and the renting to one or more negroes of a room or apartment in said apartment building, as aforesaid, has already caused the property of your orator to greatly depreciate in value for residence or business purposes; that your orator is informed and believes, and so charges, that by reason thereof and the said offer for rent and leasing of said apartments, or one of them, to said negro persons or accepting them as roomers, lessees or tenants for the use thereof by persons of the negro race as aforesaid, your oratrix' property has depreciated in value to the extent of a sum not less than five thousand ($5,000.00) dollars; and the property of the other parties to said indenture has depreciated thereby to a sum not less than one million ($1,000,000.00) dollars; that if the grievances above complained of are permitted to continue and exist and if the said defendants, or any, or either of them, are permitted to rent a room or apartment in said premises to persons of the negro race, or permit the occupancy or use of said apartment building, or any part thereof, by a person or persons of the negro race, said property of your orator will still further depreciate in value, and further that your oratrix will be compelled to abandon the use of said premises as an abode for herself and family, and the apartments or dwellings or flat buildings of the other signers of said agreement will be vacated in consequence thereof; and that the complainant, having no ade-

quate remedy at law ought to be entitled to have the covenant of said indenture prohibiting said signers thereof from leas-[fol. 316] ing, renting, conveying, or giving any of the said parcels described therein to persons of the negro race and from permitting any person or persons of the negro race to use or occupy same enforced and declared by the order of this court to be a covenant running with the land; and that said indenture of agreement is binding upon and enforceable against the said defendants, their attorneys, solicitors, agents and servants, and on each and every of them, and on all persons interested or concerned in said premises; and ought to be entitled by the order and injunction of this Honorable Court to compel the defendants to expel and cause to be removed forthwith all persons of the negro race now using or occupying said premises or a part thereof.

Forasmuch, therefore, as your oratrix is without remedy in the premises, except in a court of equity, your oratrix prays that the said Isaac Kleiman, Sam Kleiman, Jas. L. Hall, and Chas. J. Sopkin, individually and as trustee, who are made parties defendant to this bill, may be required to make full and direct answer to the same, but not under oath, the answer under oath being hereby waived; that the said defendants and all persons claiming under any contract, agreement, assignment, lease, bill of sale, or other conveyance made by them or either of them, and all persons in privity with them, and their attorneys, solicitors, agents and servants, and each and every of them, may be enjoined and restrained by the order and injunction of this Honorable Court until January 1, 1949, and thereafter until the agreement date the 30th day of September, A. D. 1927, [fol. 317] executed as aforesaid and recorded as Document #9914711 in Book 25525, page 5, of the County Records of Cook County, Illinois, on February 1, 1926, shall be abrogated as therein provided, from leasing, renting, selling, conveying, licensing or permitting the use of, or agreeing to convey either directly or indirectly the premises, or any part thereof, known as 417-9 East 60th Street, Chicago, Illinois, to or by any person or persons of the negro race and from permitting any person of the negro race to occupy any room or apartment in said premises or the basement or lobby thereof during said period and from permitting said three apartment building located at 417-19 East 60th Street, Chicago, Illinois, or any part thereof, and appurtenances thereto, from being used or occupied by a person or persons

of the negro race as defined in said indenture of agreement; that the Court may declare and decree the aforesaid agreement binding upon the said defendants, and the said covenant therein contained prohibiting said signers of said indenture from leasing, renting, conveying, licensing, selling to any person or persons of the negro race, either directly or indirectly, and the restricting of the use or occupancy of said three apartment building and appurtenances thereto by persons of the negro race and the said indenture of agreement to be a covenant running with the land and binding upon the said defendants, Isaac Kleiman, Sam Kleiman, Jas. L. Hall and Chas. J. Sopkin, individually and as trustee, and all persons claiming under any conveyance made by them or either of them, and all persons in privity with them and their attorneys, solicitors, agents and servants, and each and every of them; that the defendants may [fol. 318] be required and compelled by the order and injunction of this Honorable Court to expel and cause to be removed forthwith all persons of the negro race now using or occupying said premises or a part thereof; that defendant Jas. L. Hall, may be compelled to vacate said premises; that the lease thereon or a part thereof, if any he has, may be declared null and void and of no force and effect; and that upon a final hearing hereof, said orders and injunctions may be made perpetual; and that your oratrix may have such other and further relief in the premises as equity may require and to the Court shall seem meet.

May it please the Court to grant the Writ of Summons in Chancery, directed to the Sheriff of the said County of Cook, commanding him that he summon the defendants, Isaac Kleiman, Sam Kleiman, Jas. L. Hall and Chas. J. Sopkin, individually and as Trustee, to appear before the said Court on the first day of the next November term thereof, to be held at the Court House in the City of Chicago, in the County aforesaid, then and there to answer this bill, etc.

May it please your Honors to grant unto your oratrix the People's Writ of Injunction, to be directed to the said Isaac Kleiman, Sam Kleiman, Jas. L. Hall, and Chas. J. Sopkin, individually and as Trustee and each and every of them, restraining them and each and every of them, and all persons claiming under any contract, agreement, assignment, lease, bill of sale or other conveyance made by them or either of them, and all persons in privity with them, and their attorneys, solicitors, agents and servants and each and every

[fol. 319] of them from leasing, renting, selling, conveying, licensing, occupying, using or permitting the use of, or agreeing to convey either directly or indirectly the premises, or any part thereof, known as 417-19 East 60th Street, Chicago, Illinois, to or by any person or persons of the negro race as defined in a certain indenture of agreement, dated the 30th day of September, A. D. 1927, and recorded as Document #9914711 in Book 25525, page 5, and document #9914712—#9914713 and #9914714 in the County Records in State of Illinois on February 1, 1928, and from permitting any person of the negro race to occupy any room or apartment in said premises or the basement or lobby thereof and from permitting said three apartment building located at said 417-19 East 60th Street, Chicago, Illinois, or any part thereof and appurtenances thereto from being used or occupied by a person or persons of the negro race as defined in said indenture or agreement until the further order of this Court.

And may it please your Honors to grant unto your oratrix the People's Writ of Injunction, to be directed to the said Isaac Kleiman, Sam leiman, Jas. L. Hall and Chas. J. Sopkin, individually and as trustee, and each and every of them, and all persons claiming under any contract, agreement, assignment, lease, bill of sale or other conveyance made by them, or either of them, and all persons in privity with them, and their attorneys, solicitors, agents and servants, compelling the defendants to expel and cause to be removed forthwith from the premises located at and known as 417-19 East 60th Street, Chicago, Illinois, all persons of the negro race as defined in a certain indenture of agreement, [fol. 320] dated the 30th day of September, A. D. 1927, and recorded as Document 9914711 in Book 25525, Page 5, and documents 9914712-9914713 and 9914714 of the Cook County Records, in the State of Illinois, on February 1, 1928.

(Signed) Olive Ida Burke, Complainant; H. E. Raymond, Attorney for Complainant.

State of Illinois,
County of Cook, ss:

On this 20 day of October, A. D. 1932, before me personally appeared the above named Olive Ida Burke and made oath that she has heard read the above and foregoing Bill

of Complaint by her subscribed and knows the contents thereof and that the same is true of her own knowledge, except as to those matters which are therein stated to be upon her information and belief, and as to those matters she believes it to be true.

(Signed) Fred L. Helman, Notary Public.

19. That said defendants, Isaac Kleiman, Sam Kleiman, James L. Hall and Charles J. Sopkin, having been duly served with process, filed their respective Answers therein, which Answers are in words and figures as follows, to-wit:

[fol. 321] The Answer of Isaac Kleiman, Defendant, to the Bill of Complaint of Olive Ida Burke, Complainant

This defendant now and at all times hereafter, saving and reserving unto himself all benefit, advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and other imperfections in the said Bill of Complaint, for answer thereto, or to so much thereof as this defendant is advised is or are material or necessary for him to make answer unto, for answering says:

That this defendant as to paragraph 1 of the said Bill of Complaint, and the allegations therein contained, this defendant does not know, and he therefore neither admits nor denies the allegations of said paragraph 1 as there alleged and set forth in the said Bill of Complaint.

And further answering in this connection this defendant as to paragraphs 2, 3 and 4 in the said Bill of Complaint and the allegations therein contained this defendant does not know and he therefore neither admits nor denies the allegations of said paragraphs 2, 3 and 4 as there alleged and set forth in the said Bill of Complaint.

Further answering this defendant says that as to whether the real estate designated and described in the complaint's Bill of Complaint as parcel 472 is the same property as that which has been conveyed by Ben Piser to this defendant, this defendant does not know, and therefore neither admits nor denies this allegation of the said bill; and as to whether the defendants Sam Kleiman and Chas. J. Sopkin, individ-
[fol. 322] ually or as trustees, or either of them, have a lien or claim an interest in the ownership of the real estate described in said complainant's Bill of Complaint as parcel 472 this defendant does not know, and therefore neither ad-

mits nor denies this allegation of the said Bill of Complaint; and further answering in this connection this defendant denies that on, to-wit: the 18th day of February, 1932, he was in operation, control and management of the premises so described as parcel 472, and further denies that said parcel 472 is located at, and is known as 417-419 East 60th Street, Chicago, Illinois, and legally described as, to-wit:

Lot 5 in Block 1 in John J. Mitchell's South Park Subdivision of Blocks 9, 10, 11 in Maher's Subdivision of the Southeast corner of Section 15, Township 38, Range 14,

but admits that he is the owner of the premises so described and known as 417-419 East 60th Street, Chicago, Illinois and as further legally described as Lot 5, etc., as aforesaid, except as to said real estate being so described as parcel 472 in said Bill of Complaint, and as to any other allegations of said paragraphs of said Bill of Complaint contained which has not been herein specifically admitted or denied, this defendant neither admits nor denies but demands strict proof thereof; and further answering in this connection this defendant admits that the premises so owned by him and commonly known as 417-419 East 60th Street, Chicago, Illinois is improved with a three story apartment building containing three apartments, but denies that he threatened to [fol. 323] change the said apartment from white tenants or lessees to colored tenants or lessees, or that he ordered the white tenants or lessees or some of them to vacate said premises for the purpose of renting said premises from white to colored tenants, but states the fact that two apartments in said building were vacant and that because he could not acquire a white tenant, he therefore rented one of the said apartments to a colored tenant, and that one other apartment in said premises has been and is vacant, and this defendant in so renting said apartment to a tenant of the colored race denies that the complainant is entitled to an injunction as prayed for in said Bill of Complaint.

Further answering this defendant denies that said complainant protested to this defendant of his attempt to rent some of the apartments in said building to colored persons or lessees, but admits that he has rented one of the said apartments to one James L. Hall one other defendant herein named, and that said James L. Hall is a person of the Negro race.

Further answering this defendant states that he does not know where parcel 472 is located, and therefore neither admits or denies the allegations contained in said paragraph 7 of said Bill of Complaint with reference to said parcel 472; and further answering in this connection, this defendant denies that this said complainant's property had depreciated to the extent of Five Thousand Dollars ($5,000.00), or to any sum whatever on account of the occupancy by a Negro tenant of one of the apartments in the premises of this defendant, or that the other properties of the parties to the agreement as alleged in said Bill of Com- [fol. 324] plaint had depreciated to the extent of One Thousand Dollars ($1,000.00), or that said complaint would suffer irreparable damage if said colored occupant is so permitted to occupy said apartment in said premises.

Further answering this defendant says that some of the dwelling houses other than this defendant's, and within said restricted area provided for in said contract so alleged in said complainant's Bill of Complaint, has been and is now being occupied by persons of the colored race and that said restrictions as so defined has long been abandoned and of no use for which it was originally intended, and this defendant therefore states that the complainant is not entitled to an injunction as prayed for in said Bill of Complaint; further answering in this connection, this defendant denies that if such injunction or restraining order be not entered, that irreparable injury will be suffered by the complainant as is alleged in the said Bill of Complaint.

Further answering this defendant states that there has been a change in the character and condition of the adjoining property as to render the restrictions inapplicable according to the intent and spirit of the contract, all of which this defendant is ready and willing to maintain and prove as this Honorable Court shall direct, and this defendant prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) Isaac Kleiman, By: (Signed) Charles J. Sopkin, His Solicitor. (Signed) Charles J. Sopkin, Solicitor for defendant.

[fol. 325] Answer of Sam Kleiman, One of the Defendants Herein, to the Bill of Complaint Filed Herein

This defendant now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said Bill contained, for answer thereto or to so much and such parts thereof as this defendant is advised it is or are material for him to make answer unto, answering says:

That this defendant as to the allegations contained in said Bill of Complaint which have not been by him herein specifically admitted or denied, is a total stranger and therefore he neither admits or denies said allegations as alleged and set forth in said Bill of Complaint.

And further answering in this connection, this defendant admits that Isaac Kleiman is the owner in fee simple of the real estate commonly known and located at 417-419 East 60th Street, Chicago, Illinois, and that said real estate is improved with a three story apartment building containing three apartments, and that one of the apartments is being occupied by one James L. Hall, one of the defendants herein, and that the said James L. Hall is a person of the colored race; and further answering this defendant states that he is the holder and owner of a Trust Deed dated September 27, 1932 and recorded September 28, 1932 as Document No. 11146384, securing the payment of 1 principal note, aggregating the amount of $12,000.00 upon the real estate described as:

Lot 5 in Block 1 in John J. Mitchell's South Park Subdivision of Blocks 9, 10, 11 in Maher's Subdivision of the [fol. 326] Southeast corner of Section 15, Township 38, Range 14

which real estate is improved with a three story apartment building containing three apartments.

Further answering this defendant denies that the complainant is entitled to the relief as prayed for in the said Bill of Complaint and in this connection states that there are colored tenants in said neighborhood other then the one occupying an apartment in the premises of said Isaac Kleiman, and further states that the condition of the neighborhood is so changed as to render such restrictions and

enforcements as prayed for by the complainant inapplicable and injurious.

And this defendant prays that he be dismissed with his costs and charges in this behalf most wrongfully sustained.

(Signed) Sam Kleiman, by: (Signed) Charles J. Sopkin; (Signed) Charles J. Sopkin, Solicitor for defendant, Sam Kleiman.

Answer of James L. Hall to the Bill of Complaint Filed Herein

This defendant now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said bill contained, for answer thereto or to so much and such parts thereof as this defendant is advised it is or are material for him to make answer unto, answering says:

[fol. 327] This defendant further answering neither admits nor denies any of the allegations contained in said Bill of Complaint which have not been by him specifically answered or denied and as to those allegations he is a total stranger and therefore demands strict proof thereof.

Further answering this defendant admits that he is a tenant in the premises commonly described as 417-419 East 60th Street, Chicago, Illinois and that said premises belong to the said Isaac Kleiman, one of the other defendants herein. And this defendant denies that he had knowledge of the existence of the covenants as to the restrictions contained in the contract as alleged in said Bill of Complaint.

Further answering this defendant states that said restrictions so contained in said contract and in the Bill of Complaint herein have long been abandoned in that there are colored occupants in other parts of said restricted area and that said complainant is not entitled to the relief as prayed for, and thence this defendant prays that he be discharged with costs most wrongfully sustained.

(Signed) James L. Hall, by: (Signed) Charles J. Sopkin, His Solicitor.

[fol. 328] Answer of Charles J. Sopkin, One of the Defendants Herein to the Bill of Complaint Filed Herein

This defendant, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said Bill contained, for answer thereto or to so much and such parts thereof as this defendant is advised it is or are material for him to make answer unto, answering, says:

This defendant further answering neither admits nor denies any of the allegations contained in the said Bill of Complaint, as he is a total stranger to the matters so alleged in the Bill of Complaint.

Further answering this defendant states that he claims no interest, lien, right or title in any of the real estate belonging to the defendant, Isaac Kleiman, which real estate is more fully described in said Complainant's Bill of Complaint, except however, that this defendant is mentioned as Trustee in a Trust Deed executed by Isaac Kleiman and dated the 27th day of September, 1932, recorded in the Office of the Recorder of Deeds of Cook County, Illinois as Document No. 11146384 to secure the payment of certain notes therein described, which Trust Deed and notes as this defendant is informed and believes, are being held by Sam Kleiman, one of the defendants herein, but to which this defendant claims no interest.

And therefore prays that he may be discharged with his costs in this behalf most wrongfully sustained.

(Signed) Charles J. Sopkin.

[fol. 329] 20. That on June 7, 1933 the parties to said proceeding of Burke *v.* Kleiman, *et al.*, before said Superior Court entered into a Stipulation of Facts which appears in the Decree in paragraph 21 of this Reply.

21. That the Decree thereupon entered in said cause of Burke *v.* Kleiman, *et al.*, in the Superior Court on October 2, 1933 was and is in words and figures as follows, to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

IN THE SUPERIOR COURT OF COOK COUNTY

Gen. No. 567687

OLIVE IDA BURKE

vs.

ISAAC KLEIMAN et al.

Decree

1. This day comes the complainant by E. Raymond, her solicitor, and the defendants by Charles J. Sopkin, their solicitor.

2. And this cause coming on to be heard upon the Bill of Complaint herein, the answers of the defendants thereto, the replication of the complainant to such answers, and upon proofs offered and taken; and the court, having heard the arguments of counsel for the respective parties and being now fully advised in the premises, finds that it has jurisdiction of the subject matter of this cause and of the [fol. 330] parties thereto; that the material allegations in said bill of complaint are true and that the equities of this cause are with the complainant, and that said complainant is entitled to the relief therein and thereby prayed.

3. And the court further finds that the parties hereto stipulated in writing upon the material facts to be considered by the court as the evidence in this cause, and upon which together with the pleadings in the case, the decree of this court should be based, as follows:

Stipulated Facts

That, on, to-wit: the 30th day of September, 1927, about five hundred or over white persons duly executed and entered into a Restrictive Agreement described in the Bill of Complaint herein, said white persons constituting and comprising more than ninety-five per cent (95%) of then owners of said frontage described in said Agreement, a copy of which is herein set forth, which agreement with respect to recordation and execution thereof was fully completed within the time set forth, and was on February 1,

1928, recorded in the Recorder's office of the Recorder of Deeds of Cook County, Illinois, in Book No. 25525 of Records, on Page No. 5 as Document No. 9914711, except, however, that signatures to said agreement and notarizations thereof were recorded in said office on said date as Document Nos. 9914712, 9914713, 9914714, respectively; said agreement above refer-ed to being in words and figures, except as to signatures and notarizations, as follows:

This Agreement entered into this 30th day of September, [fol. 331] 1927, by and between the undersigned owners of land on the one or the other side of Evans, Langley, Champlain, St. Lawrence, Rhodes, Eberhart, Vernon and South Park Avenues, between 60th and 63rd Streets and on 60th, 61st and 62nd Streets between South Park and Cottage Grove Avenues, in the City of Chicago, witnesseth, that

Whereas, the following named persons own the respective parcels of land in said area set immediately under their names, having the frontage hereinafter set forth:

And, Whereas, the parties hereto feel that the restrictions and covenants hereinafter imposed and created are for the best interests of all the parties hereto and of the property hereinafter described.

In Consideration of the promises and of the mutual covenants hereinafter made, and of the sum of Five Dollars ($5.00) in hand paid to each of the parties hereto by each of the other parties hereto, the receipt of which is hereby acknowledged, each party as owner of the parcel of land above described immediately under his name, does hereby covenant and agree with each and every other of the parties hereto, that his said parcel of land is now and until January 1st, 1948, and thereafter until this agreement shall be abrogated as hereinafter provided, shall be subject to the restrictions and provisions hereinafter set forth, and that he will make no sale, contract of sale, conveyance, lease or agreement and give no license or permission in violation of such restriction or provisions, which are as follows:

1. The restriction that no part of said premises shall in any manner be used or occupied directly or indirectly by [fol. 332] any negro or negroes, provided that this restriction shall not prevent the occupation, during the period of their employment as janitors' or chauffeurs' quarters in the basement or in a barn or garage in the rear, or of

servant's quarters by negro janitors, chauffeurs or house servants, respectively, actually employed as such for service in and about the premises by the rightful owner or occupant of said premises.

2. The restriction that no part of said premises shall be sold, given, conveyed or leased to any negro or negroes, and no permission or license to use or occupy any part thereof shall be given to any negro except house servants or janitors or chauffeurs employed thereon as aforesaid.

The covenants, restrictions, and agreements herein contained shall be considered as appurtenant to and running with the land, and shall be binding upon and for the benefit of each party hereto and may be enforced by any of the parties hereto by any permissible legal or equitable proceedings, including proceedings to enjoin violation and for specific performance; provided, however, that in any action brought to set aside any deed made in violation of any of the provisions of this agreement, it shall be a good defense thereto that prior to the institution of each suit, the title to the premises then in question had become vested in, and was then owned by a corporation or a white person, for value; and provided, further that the lien of no mortgage or trust deed in the nature of a mortgage shall be impaired or invalidated by reason of the breach of any of the provisions of this agreement, whether any such breach shall have occurred prior or subsequent to the recording of any such mortgage or trust deed; and provided, further, that nothing contained in the foregoing provisos shall in any manner impair the [fol. 333] right of any person or persons interested to enforce at all times and against all persons the restrictions in this agreement contained prohibiting the use or occupation of all or any part of said premises by a negro or negroes.

This agreement and the restrictions herein contained shall be of no force or effect unless this agreement or a substantially similar agreement, shall be signed by the owners above enumerated of ninety-five per centum of the frontage above described, or their heirs or assigns, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31, 1928. Provided, however, that if the owner of any of said parcels or of any part thereof shall be under disability as, for example, when the title is

held, without such power, by testamentary trustees or other fiduciaries, the frontage so owned shall be treated as though the owners thereof had power to sign, and have signed this agreement, for the purpose of determining whether this agreement becomes effective or not under the provisions of this paragraph.

It is understood that for convenience, a number of counterpart or concurrent instruments have been prepared of even date herewith, the text of each of which is substantially the same as that of this instrument, and that the execution of any one of such instruments shall have the same effect as the execution of this instrument by the same person would have, and it is understood that parties to this agreement shall include not only those persons who shall sign this instrument but also all persons who shall sign any of said counterpart or concurrent instruments, and that this instru- [fol. 334] ment and all of said counterpart or concurrent instruments shall constitute one agreement. It being contemplated that changes in ownership may occur between the date which this instrument bears and that date when it shall become effective, or that there may possibly be some misrecital of ownership herein contained, it is further understood that the execution hereof by the person who shall be the owner of any of said parcels of land at the time of such execution shall have the same effect as though such person had been the owner thereof on the date hereof and was so described herein, whether the recital of ownership herein contained be made to conform to the facts as to ownership at the time of execution, the recital in any of said instruments shall be made different from that contained in the others, that difference shall not prevent all of such instruments from being construed to be substantially similar to each other.

No restriction imposed hereby shall be abrogated or waived by any failure to enforce the provisions hereof, no matter how many violations or breaches may occur.

This agreement and the restrictions herein expressed may be abrogated at any time on or after January, 1948, by the written agreement of the owners of seventy-five per centum of the frontage owned by the parties who shall sign this agreement, as herein set forth, such abrogation to be effective from and after the date of delivery and recording of such written agreement. Provided, however, that if the owner of any of said parcels or any part thereof shall be

under disability, as for example, that of minority, or for any other reason shall not have the power to execute such [fol. 335] abrogation agreement, as for example, when the title is held without such power, by testamentary trustee or other fiduciaries, the frontage so owned shall be treated as though the owners thereof had power to sign, and had signed such abrogation agreement, for the purpose of determining whether such abrogation agreement becomes effective or not under the provision of this paragraph.

The invalidity of any restriction hereby imposed, or of any provision hereof, or any part of any such restriction or provision shall not impair or affect in any manner the validity, enforceability or affect the rest of this agreement.

Pronouns herein employed in the masculine gender shall be construed to include the feminine and neuter genders, and the word "party" or "persons" to include natural and artificial parties or persons.

The term "negro" as used herein shall include every person having one-eighth part or more of negro blood, or having any appreciable mixture of negro blood, and every person who is what is commonly known as "Colored person".

In any case where there is a recorded lease of any parcel of the property described herein for a term ending more than five years after any given date, the owner of the reversion and the owner of the leasehold estate together shall be deemed to be the owners of such parcel on such given date within the meaning of this contract, and whenever the signature of the owner of such parcel shall be required on such given date under the provisions, whatever interest any signer of this instrument owns in any of said property shall be bound by the provisions hereof. Lease-s under unrecorded [fol. 336] leases on any given date and under leases for terms ending less than five years after such given date shall not be regarded as owners within the meaning of this contract.

The undersigned spouses of land herein described join herein for the purpose of signifying their assent hereto and of subjecting their rights of dower, if any, to the restrictions and provisions imposed hereby.

Time is of the essence of this contract and all the terms, conditions and provisions hereof.

The covenants, restrictions and agreements herein contained shall be binding on, and for the benefit of, and may be enforced by and against, each party hereto, his succes-

sors and assigns, and the heirs, executors, administrators and successors of them respectively.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first aforesaid.

That among the signatures to said Agreement was one Hannah Studdert, the owner at the time of the execution of said agreement of the parcel of land owned at the time of the filing of the bill of complaint and now owned by complainant, described as, to-wit:

Lot nineteen (19) in Block Two (2) of John J. Mitchell's South Park Subdivision of Blocks nine (9), Ten (10) and Eleven (11) in Maher's Subdivision of the Southeast quarter (SE ¼), Section Fifteen (15), Township Thirty-eight (38), Range Fourteen (14), East of the Third Principal Meridian, also otherwise known as 6039 Vernon Avenue, Chicago, Cook County, Illinois,

[fol. 337] which real estate is improved with a two-apartment building of great value and so identified, designated and described in said agreement as Parcel #498; that title thereto and ownership came to complainant from Hannah Studdert by mesne conveyance.

That among the signers of said agreement was also one Ben Piser, the owner at the time of execution and recordation of said agreement of the parcel of land owned at the time of the filing of Bill of Complaint herein and now owned by the defendant, Isaac Kleiman, who became the owner thereof by mesne conveyances and legally described as, to-wit:

Lot five (5) in Block One (1) in John J. Mitchell's South Park Subdivision of Blocks Nine (9), Ten (10) and Eleven (11) in Maher's Subdivision of South East Quarter (SE ¼) of Section fifteen (15), Township Thirty-eight (38) North, Range Fourteen (14) East of the Third Principal Meridian, also otherwise known as 417-19 East 60th Street, Chicago, Cook County, Illinois;

and designated and described in said agreement as Parcel #472, which is improved with a three-story brick apartment building.

That the defendant, Sam Kleiman, is the owner and holder of a first lien of mortgage on the aforementioned real estate to secure the payment of a note in the amount of Ten

Thousand Dollars ($10,000.00); that the defendant, Charles J. Sopkin, is the Trustee in said lien or mortgage.

That the defendant, Jas. L. Hall, is a person of negro race as defined in said Restrictive Agreement and did move into and become a tenant in said premises lastly described [fol. 338] on the 18th day of October, 1932.

That the defendants, Sam Kleiman and Isaac Kleiman, did rent said apartment to the said Jas. L. Hall on, to-wit: the 18th day of October, 1932, prior to the filing of the said bill of complaint, and that the said Jas. L. Hall is a negro under the terms of said instrument.

That all of the defendants, and each of them, had full knowledge and notice of the contents and terms of said agreement, and that the said Jas. L. Hall had full knowledge and notice at the time he became a tenant therein and is still a tenant in said premises.

That the real property in said agreement comprised an area extending from south side of 60th Street south to north side of 63rd Street inclusive being a distance of three city blocks inclusive, and from west side of Cottage Grove Avenue west to west side of South Park Avenue inclusive, being a distance of nine city blocks inclusive; that the frontage on the west side of South Park Avenue is the west boundary line of said area, all in the City of Chicago, County of Cook and State of Illinois.

That there were at the time and prior to the filing of the bill of complaint herein, three other properties within the terms of said agreement having negro tenants, which properties are as follows:

(a) a hotel located at 6014 South *South* Park avenue having sixty (60) colored tenants and being a distance of about 650 feet from complainant's property and 250 feet from the property of the defendant, Isaac Kleiman, and [fol. 339] within said area, and a party to said agreement, by mesne conveyances. Bill of injunction filed since the filing of the bill of complaint herein, and the same is pending.

(b) the southeast corner of 60th Street and South Park Avenue containing twenty-four (24) negro tenants and having a frontage of 50 feet on 60th Street and 125 feet on South Park Avenue, being a distance of 425 feet from the complainant's property and 75 feet from the defendant, Sam Kleiman's property, a party to said agreement by

mesne conveyances. Petition having been filed to make the Receiver in possession a party to a bill for injunction said petition having been denied.

(c) the southwest corner of 60th Street and South Park Avenue, containing twelve (12) negro tenants, being a frontage of 50 feet on South Park Avenue and 125 feet on 60th Street and being a distance of 531 feet from the complainant's property and 231 feet from the property of the defendant, Isaac Kleiman, a party to said agreement by mesne conveyances.

All of said properties being within the said restricted area; that complainant's property is located on the east side of Vernon Avenue at 6039, as aforesaid; that the distance by sidewalk to the nearest tenant prior to that in the property of the defendant, Isaac Kleiman, is five hundred feet; that is to say to the property located at the Southeast corner of 60th Street and South Park Avenue, as aforesaid.

That the Restrictive Agreement aforesaid comprises 583 parcels of real estate ranging from a frontage of 25 feet to 100 feet each.

[fol. 340] That all the property mentioned in said agreement with the exception of three parcels as described as aforesaid, were prior to the filing of the bill of complaint herein occupied by white tenants and that the complainant's and defendant's properties are both within said area so described in said Restrictive Agreement.

That the said real estate so described in said Restrictive Agreement are all improved with buildings ranging from two to thirty-two apartments; that the tenants are all white tenants on 60th Street on which the defendant, Isaac Kleiman's property is located, with the exception of the colored tenants occupying the premises commonly known as the southeast and the southwest corners of 60th Street and South Park Avenue facing both 60th Street and South Park Avenue, which are more fully described above; that the contention of the complainant is that unless an injunction is granted, said neighborhood will become mixed, both white and colored, with its attendant evils.

END OF STIPULATED FACTS

The Court further finds that the facts and each of them above set forth in Paragraph #3 of this decree are true and constitute the evidence in this cause.

The Court further finds that the indenture of agreement above set forth and described in the bill of complaint herein is a covenant running with the land and binding upon the defendants and each of them and on the signers of said indenture of agreement, their grantees and assignees and upon all persons claiming under any conveyance made by [fol. 341] them or either of them and all persons in privity with them and their attorneys, solicitors, agents and servants, lessees and licensees.

That said indenture of agreement was in full force and effect on February 1, 1928, and all conditions therein contained with respect to execution and recordation thereof were fully complied with; and that the same was recorded, in the Recorder's Office of the Recorder of Deeds of Cook County, of Illinois, in February 1st, 1928, as Documents #9914711, #9914712, #9914713 and #9914714, respectively.

The Court further finds that said indenture agreement is and has been in full force and effect at all times since the first day of February, 1928, and that all terms of said indenture agreement are entirely valid and binding until January 1, 1948, and is binding upon the defendants and each of them and all persons claiming under any contract, agreement, assignment, lease, bill of sale, or other conveyance made by them or either of them, their attorneys, solicitors, agents and servants and each and every of them.

The Court further finds that the lease made to Jas. L. Hall, the defendant, a negro within the terms of said agreement and his testimony in the apartment he occupies in the premises above described and known otherwise as 417-19 East 60th Street, Chicago, Illinois, is in violation of said indenture and said lease and tenancy of said Jas. L. Hall, is invalid and unlawful.

The Court further finds that the use or occupancy of said apartment in said building or premises hereinabove described, by said Jas. L. Hall, one of the defendants herein, a person of the negro race or any other person of the negro [fol. 342] race, will greatly depreciate values of real estate in ~~said district included~~ in said indenture of agreement and is a violation of said agreement, and will cause irreparable injury to the complainant and the other parties to the indenture aforesaid.

It is therefore ordered, adjudged and decreed that the defendants, Isaac Kleiman, Sam Kleiman, Jas. L. Hall and

Chas. J. Sopkin, individually and as Trustee, and each of them, and all persons claiming under any contract, agreement, lease, bill of sale, or other conveyance made by them, or either of them, and all persons in privity with them, and their attorneys, solicitors, agents and servants, and each and every of them, absolutely desist and refrain from leasing, renting, selling, conveying, licensing or permitting the use of, or agreeing to convey either directly or indirectly the premises known as 417-19 East 60th Street, Chicago, Illinois, and legally described as follows:

Lot five (5) in Block One (1) in John J. Mitchell's South Park Subdivision of Blocks nine (9), ten (10) and eleven (11) in Maher's Subdivision of South East Quarter (SE¼) of Section fifteen (15), Township Thirty-eight (38) North, Range Fourteen (14) East of the Third Principal Meridian,

to or by any person or persons of the negro race and from permitting any person of the negro race to occupy any room or apartment in said premises or the basement or lobby thereof, except as provided in said Agreement, to-wit:

1. "The restriction that no part of said premises shall be in any manner used or occupied directly or indirectly by any negro or negroes, provided that this restriction shall [fol. 343] not prevent the occupation, during the period of their employment, as janitors' or chauffeurs' quarters in the basement or in a barn or garage in the rear, or of servants' quarters by negro janitors, chauffeurs or house servants, respectively, actually employed as such for service in and about the premises by the rightful owner or occupant of said premises.

2. The restriction that no part of said premises shall be sold, given, conveyed or leased to any negro or negroes, and no permission or license to use or occupy any part thereof shall be given to any negro except house servants or janitors or chauffeurs employed therein as aforesaid."

until January 1, 1948.

The aforementioned agreement being dated September 30, 1927, and recorded as documents Nos. 9914711, 9914712, 9914713 and 9914714 respectively.

It is further ordered, adjudged and decreed that the defendant, Jas. L. Hall, and all persons of the negro race

holding under him since the filing of the Bill of Complaint herein within thirty days from the date of the entry of this decree, vacate the said premises located at 417-419 East 60th Street, Chicago, Illinois, and upon his failure to do so that upon the motion of the complainant a Writ of Assistance or other process shall issue herein to dispossess the said James L. Hall and all persons of the negro race holding under him from said premises forthwith, and

It is further ordered, adjudged and decreed that the said defendants, excepting Chas. J. Sopkin, individually, pay to the complainant the costs of the proceeding to be taxed by [fol. 344] the Clerk of this Court, and that the complainant have execution therefor.

From which said foregoing Decree the defendants, the said Isaac Kleiman, Sam Kleiman, Jas. L. Hall and Chas. J. Sopkin, individually and as Trustee, pray an Appeal to the Supreme Court of Illinois, which appeal is granted to said defendants upon their filing a bond herein in the sum of Five Hundred Dollars ($500.00) within thirty days to be approved by the court, and filing a Certificate of Evidence herein within sixty days from this date.

Enter:

(Signed) Robert E. Gentzel, Judge.

O.K. H. E. Raymond, Solicitor for Complainant.
O.K. C. J. Sopkin, Solicitor for Defendants.

22. That said cause was appealed to the Supreme Court of Illinois by the defendants therein, which Court transferred said cause to the said Appellate Court of Illinois, First District, which Court affirmed the said Decree of the Superior Court of Cook County, which affirmance is reported in Volume 277 of the Illinois Appellate Reports, page 519, reference thereto being had.

23. That said Decree rendered by the Superior Court of Cook County, Illinois in Burke v. Kleiman, et al., General No. 567687 and the affirmance thereof by the Appellate Court of Illinois, First District, was and remains in full force and effect, not reversed or set aside; that said Decree was duly rendered after full hearing on the merits as to [fol. 345] each and every of the matters set forth in the pleadings therein and was enforced by a Writ of Assistance issuing out of the Office of the Clerk of the said Superior Court in said cause.

24. That said plaintiffs are ready to produce certified copies of the said Bill of Complaint, Answers thereto, and Decree of the Superior Court, and a certified copy of the Opinion of Affirmance of said Decree in the Appellate Court of Illinois, First District.

Wherefore the plaintiffs, as to the said Answers of all of the defendants, and each of them say that the defendants, and each of them, ought not to be admitted to plead the said respective Answers as to so much of them, and each of them, as deny, dispute or contest the execution, delivery, existence, performance of conditions precedent, validity, force and effect of the said Restrictive Agreement because the plaintiffs say an estoppel by verdict exists in regard to each and all of said matters in that they are res judicata, and plaintiffs pray judgment that said defendants and each of them are estopped, as aforesaid, by the determination, verdict and judgment of said Superior Court of Cook County in the said case of Burke v. Kleiman aforesaid and the affirmance thereof by the said Appellate Court, from denying the execution, delivery, existence, performance of conditions precedent, validity, force and effect of said Restrictive Agreement as matters res judicata.

(Signed) Charles A. Churan, Schuyler & Hennessy, Angus Roy Shannon, Attorneys for Plaintiffs.

[fol. 346] State of Illinois,
County of Cook, ss:

Charles A. Churan, being first duly sworn upon his oath says that he is one of the attorneys for the plaintiffs, and the duly authorized agent of the plaintiffs in this behalf; that he has read the foregoing reply; that the same is true.

Affiant Further Certifies that the foregoing Reply is not interposed for delay and, in his opinion, is wellfounded in point of law.

(Signed) Charles A. Churan.

Subscribed and sworn to before me this 17th day of December A. D., 1937. Lena M. Bernstein, Notary Public.

Objections of plaintiffs filed January 14, 1938, by leave of Court to Answer of defendant James Joseph Burke.

OBJECTIONS TO ANSWER OF JAMES JOSEPH BURKE

Now come the plaintiffs by Charles A. Churan, Schuyler & Hennessy and Angus Roy Shannon, their attorneys, and move to strike certain portions of the Answer of defendant James Joseph Burke for the following reasons, to-wit:

First. It is alleged in paragraph 8 on page 9 of the Complaint that the Restrictive Agreement involved in this cause was decreed by the Superior Court of said County in the case of Olive Ida Burke v. Isaac Kleiman, General No. [fol. 347] 567687, to be in full force and effect and a covenant running with the land, which Decree was affirmed by the Appellate Court of Illinois, First District, on November 27, 1934.

Second. Said defendant Burke in his Answer in paragraph 8 admits that said Olive Ida Burke, the plaintiff in said Burke v. Kleiman case in the Superior Court of Cook County, was his wife and that in the year 1928 said defendant Burke purchased through his said wife, Olive Ida Burke, the premises commonly described as No. 6039 Vernon Avenue located in said restricted area from one Hannah Studdert, who was one of the signers of said Restrictive Agreement.

Third. That said defendant, James Joseph Burke is therefore a privy to said Agreement and by the terms of the Decree entered on October 2, 1933 in said Superior Court of said County in the said Burke v. Kleiman case, and by the affirmance of said Decree in the Appellate Court of Illinois, First District, on November 27, 1934, and is estopped thereby from attacking the execution, delivery, performance of conditions precedent, validity, force and effect of said Restrictive Agreement alleged and set forth in haec verba in the plaintiffs' Complaint.

Fourth. That for said reasons those portions of the Answer of said defendant, Burke, as set forth in paragraphs 1, 2, 3, 4, 8, 9, 10, 11, 12 and 17, wherein said defendant denies the execution, recordation, validity or effect of said Restrictive Agreement, are insufficient in law as a defense in this cause and should be stricken.

Fifth. For the same reason to strike out of said paragraphs of said defendant's Answer, all references to the [fol. 348] effect that said Restrictive Agreement is void, or that the conditions precedent were not complied with.

Sixth. To strike out all averments in said Answer as to occupation by colored persons (or negroes) outside of the restricted area as immaterial and irrelevant.

Seventh. Paragraph 17 of said defendant's Answer that said Restrictive Agreement is unconstitutional and void, or against public policy of the State of Illinois, or that said Restrictive Agreement is unreasonable, illegal and void for the reasons alleged in paragraph 16 of said Answer is argumentative, insufficient, immaterial and irrelevant in law as a defense or defenses to said Complaint.

Wherefore, plaintiffs pray that said objections to the said defendant's Answer as to the particulars pointed out be sustained and the Answer as to such portions be stricken.

Signed by attorneys for plaintiffs and verified January 12, 1938.

Objections of Plaintifs Filed January 14, 1938, by Leave of Court to Answer of Israel Katz

Now come the plaintiffs by Charles A. Churan, Schuyler & Hennessy and Angus Roy Shannon, their attorneys, and move to strike certain portions of the Answer of the defendant, Israel Katz, for the following reasons, to-wit:

First. The said defendant was an original signer of said Restrictive Agreement and is bound by the Decree alleged in paragraph 8 on page 9 of the plaintiffs' Complaint to have been rendered in the Superior Court of Cook County [fol. 349] in the case of Olive Ida Burke v. Isaac Kleiman, General No. 567687, finding said Decree to be in full force and effect, and which Decree was affirmed by the Appellate Court of Illinois, First District, on November 27, 1934.

Second. That for said reason those portions of the Answer of said defendant, Katz, as set forth in paragraphs 1, 3, 9, 12, 13, 17, 22, 24, 25, 27, wherein said defendant denies the execution, recordation, validity or effect of said Restrictive Agreement are estopped by reason of the

said Decree in Burke v. Kleiman, and the affirmance thereof by the Appellate Court of Illinois from attacking the validity, force and effect of said Decree, and said portions of the Answer should be stricken.

Third. As to the portions of paragraph 10 of said Answer wherein said defendant alleges that large numbers of white owners desire to sell to negroes, plaintiffs say it should be stricken as insufficient, for the reason that said Restrictive Agreement provides that said Agreement may not be abrogated until after January 1, 1948, and then only by the written agreement of the owners of seventy-five per centum (75%) of the frontage owned by the parties who signed said Agreement.

Fourth. Paragraph 17, attacking said Restrictive Agreement as invalid, unlawful and illegal restraint on the alienation of land, and that same is unconstitutional, and that same deprives the defendants of their rights and property without due process of law, and that same is in violation of the Constitution of the State of Illinois, and in violation of the 5th, 13th and 14th amendments to the Constitution of the United States, and that same interferes with the [fol. 350] freedom of contract, and other reasons alleged in said paragraph, is insufficient in law as a defense against said Restrictive Agreement and should be stricken.

Fifth. Paragraph 18 is an insufficient defense and should be stricken.

Sixth. Paragraph 19 does not allege a sufficient defense and should be stricken.

Seventh. Similar restriction agreements have been held to be not against the public policy of other States similarly situated as the State of Illinois, and not against the policy of the United States or the Bill of Rights in these respects and not violative of Sections 1977 and 1978 of the Revised Statutes, or the 13th, 14th and 15th amendments of the Constitution of the United States, and said Answer in this respect is insufficient as a defense and should be stricken.

Eighth. The same objection to paragraphs 21, 22 and 24.

Ninth. Plaintiffs object to paragraph 27 and ask that same be stricken for the reason that all of the reasons as to lack of jurisdiction, parties, vagueness and indefinite-

ness of the Complaint, lack of privity and against the relief prayed have been passed upon by this Court and the Appellate Court of Illinois, and cannot again be urged in this Answer.

Tenth. That said Answer of the defendant is in other respects indefinite, argumentative, abounds in needless repetitions, irresponsive to the Complaint and insufficient as a defense to said Complaint.

Wherefore, plaintiffs pray that said objections to the said [fol. 351] defendant's Answer in the particulars pointed out, be sustained and the Answer as to such portions be stricken.

(Signed by attorneys for plaintiffs and verified.)

Objection of Plaintiffs Filed January 14, 1938, by Leave of Court to Answer of Harry H. Pace and Supreme Liberty Insurance Company:

Now come the plaintiffs by Charles A. Churan, Schuyler & Hennessy and Angus Roy Shannon, their attorneys, and move to strike certain portions of the Answers of the defendants, Harry H. Pace and Supreme Liberty Life Insurance Company for the following reasons, to-wit:

First. The Complaint alleges that said defendant Pace is occupying the premises commonly known as No. 413 East 60th Street, which premises are located in the area covered by the Restrictive Agreement and that the owner of said premises restricted same in the original agreement; and it further alleged that said Pace is a defendant in an action filed in the Superior Court of said County on May 12, 1937 in the case of Cook, *et al. v.* Lutz, *et al.*, General No. 37S-6290 to enforce said Restrictive Agreement against him, and it further appears that said defendant Pace, since the filing of said action in the Superior Court, has become the owner of record of said premises No. 413 East 60th Street.

Second. That by reason of the ownership of said premises No. 413 East 60th Street and therefore a privy to said agreement, said defendant Pace is estopped and bound by the Decree of the Superior Court of said County entered in the case of Olive Ida Burke *v.* Isaac Kleiman, *et al.*, Gen-

eral No. 567687, in which action said Restrictive Agreement [fol. 352] was adjudged and decreed to be in full force and effect and a covenant running with the land, and which Decree was affirmed by the Appellate Court of Illinois, First District, on November 27, 1934.

Third. That it is alleged in the Complaint that said defendant Pace is Secretary of the Supreme Liberty Life Insurance Company, and that said Company, through Pace, knowingly made a loan on No. 413 East 60th Street, and another loan on No. 6140 Rhodes Avenue, for the purpose of assisting said defendants Pace and Hansberry to violate said Agreement; that said defendants Pace and Supreme Liberty Life Insurance Company are estopped by reason of said Decree rendered in the case of Burke v. Kleiman, aforesaid, from attacking the force, effect and validity of said Restrictive Agreement, and that paragraphs 1, 3, 8, 10, 11 and 12 of the Answers of said defendants Pace and Supreme Liberty Life Insurance Company, wherein said defendants deny the execution, recordation, force, effect and validity of said Restrictive Agreement and that same is a covenant running with the land, is insufficient in law as a defense to said Agreement, and should be stricken.

Third. That paragraph 16, which alleges that said Agreement is unconstitutional, violative of the Constitution of the United States, and that same is against the public policy of the State of Illinois, and that same is unreasonable, illegal and void for the various reasons stated in said paragraph, is insufficient in law as a defense, and same should be stricken from the Answer.

Fourth. That said Answer is otherwise indefinite, not [fol. 353] responsive, evasive and not in compliance with the statutes of the State of Illinois in respect to pleadings.

Wherefore, plaintiffs pray that said several Answers of said defendants, with respect to the matters pointed out herein, may be stricken and said defendants ordered to file proper, sufficient and definite Answers to said Complaint.

(Signed by attorneys for plaintiffs and verified July 28, 1938.)

ORDER

Order entered January 14, 1938, by Judge Bristow giving plaintiffs leave to file instanter objections to Amended Answers of defendants Jay B. Crook, Hallie C. Crook and to Answers of defendants James Joseph Burke, Israel Katz, Harry M. Pace and Supreme Liberty Life Insurance Company heretofore filed and that objections heretofore filed to Answer of defendants Carl A. Hansberry and Nannie L. Hansberry stand as plaintiffs' objections to their Amended Answer, and that hearing on objections be set for January 15, 1938.

ORDER

Order entered February 25, 1938, continuing motion of plaintiffs for leave to file Amendment to Complaint instanter to March 7, 1938. (Judge Burke.)

ORDER

Order entered March 14, 1938, by Judge Bristow giving plaintiffs leave to file Amendment to Complaint instanter and that defendants' Answers to stand or leave to defendant to file Amended Answer as defendants may desire.

Amendment to Complaint filed (see Abstract 77).

VERIFIED REPLY OF PLAINTIFFS FILED JULY 29, 1938, TO AMENDED ANSWER OF ISRAEL KATZ FILED JULY 14, 1938:

[fol. 354] Now comes the plaintiffs by Charles A. Churan, Schuyler & Hennessy and Angus Roy Shannon, their attorneys, and reply to the Amended Answer of defendant Israel Katz, filed July 14, 1938, and say:

1. These plaintiffs re-adopt their Reply filed December 17, 1937, to the Amended Answers of the defendants Carl A. Hansberry, Nannie L. Hansberry, Jay B. Crook and Hallie C. Crook, and to the respective Answers of defendants James Joseph Burke, Harry H. Pace, Israel Katz and Supreme Liberty Life Insurance Company, as the plain-

tiffs' Reply to the Amended Answer of defendant Israel Katz filed July 14, 1938, and by reference to said Reply pray that the same may be permitted to stand as their Reply to said Amended Answer of Israel Katz.

2. Plaintiffs deny the allegations of paragraphs 1, 2, 3, 4, 5, 7, 8 and 9 and say that by the decrees mentioned and described in said Reply of the plaintiffs, the defendant Israel Katz is estopped from denying, disputing or contesting the execution, delivery, existence, performance of condition precedent, the validity, force or effect of the said Restrictive Agreement by the determination, verdict and judgment of said Superior Court of Cook County pleaded by the plaintiffs in their said Reply and is bound thereby.

3. Plaintiffs deny the allegations of paragraph 8 of said Amended Answer; and deny that the decree in the case of Burke *v.* Kleiman was obtained by fraud and collusion, and deny that said cause was not contested, and deny that same was a dummy proceeding, but state the fact to be that said action was a bona-fide contested proceeding from its incep- [fol. 355] tion to its affirmance in the Appellate Court; that the mandatory injunction awarded in said cause was actually carried out by the issuance of a Writ of Assistance against the defendants therein as by reference to the record thereof may be fully shown.

4. Plaintiffs deny that the decree in the case of Penoyer *v.* Cohn in the Superior Court of Cook County was obtained by fraud, or entered by mistake.

5. Plaintiffs deny that the area covered by said Restrictive Agreement has changed from white persons to negroes, that the only negroes in said entire area occupying any buildings in said restricted area at the time of the filing of the Complaint herein were and are located on South Park Avenue between 60th and 61st Street, also the premises at 413 East 60th Street unlawfully owned and occupied by defendant Pace, the premises at 423 East 60th Street which have never been restricted, and the premises owned and occupied by defendants Hansberrys at 6140 Rhodes Avenue; that none of the plaintiffs herein consented to or acquiesced in the ownership or occupation of said buildings by negroes and that said buildings so occupied by negroes, except the property at 6140 Rhodes Avenue unlawfully owned and occupied by defendants Hansberrys, are distant

more than three (3) blocks from any of the properties of the plaintiffs herein.

6. Plaintiffs deny the allegations of paragraph 15 of defendant's Answer and deny that said Katz did not threaten to sell his property to negroes.

7. Plaintiffs further say that the allegations of paragraphs 17, 18, 19, 20, 21, 22, 23 and 24 are immaterial, [fol. 356] irrelevant, and incompetent and do not allege a proper defense, or defenses to said Complaint as amended.

8. Plaintiffs deny the allegations and conclusions of paragraphs 25, 26 and 27, and deny that plaintiffs have been guilty of laches in respect to the enforcement of said Agreement.

Wherefore, the plaintiffs say that said defendant Israel Katz ought not to be admitted to plead his Amended Answer, or so much thereof as tends to deny, dispute or contest the execution, delivery, existence, performance of conditions precedent, validity, force and effect of the said Restrictive Agreement because they say, an estoppel by verdict exists as to each and all of said matters in that they are res judicata, and plaintiffs again pray judgment that said defendant Katz and each of said other defendants are estopped by the determination, verdict and judgment of said Superior Court of Cook County in the said case of Burke v. Kleiman, the affirmance thereof by the said Appellate Court and by the decrees in the aforesaid cases of Cook v. Yondorf and Penoyer v. Cohn from denying the execution, delivery, existence, performance of conditions precedent, validity, force and effect of said Restrictive Agreement as matters res judicata; and as to those other matters pleaded by said defendant Katz which are not immaterial, incompetent or irrelevant the plaintiffs demand strict proof.

(Signed by attorneys for plaintiff and verified July 29, 1938.)

OBJECTIONS OF PLAINTIFFS FILED JULY 29, 1938, TO THE JOINT AND SEVERAL REJOINDERS OF DEFENDANTS CARL A. HANSBERRY, NANNIE L. HANSBERRY, SUPREME LIBERTY LIFE IN-
[fol. 357] SURANCE COMPANY AND HARRY H. PACE, FILED HEREIN ON JULY 14, 1938 TO THE JOINT REPLY OF THE PLAINTIFFS THERETOFORE FILED

Now come the plaintiffs by Charles A. Churan, Schuyler & Hennessy and Angus Roy Shannon, their attorneys, and state that the said joint and several Rejoinders of said defendants is not a proper, material, relevant or competent Rejoinder to the Reply of the plaintiffs for the following reasons:

As to Paragraph 2 of said Rejoinder, these plaintiffs deny that the cases referred to in the plaintiffs' Reply to-wit: Burke v. Kleiman, Cook v. Yondorf and Penoyer v. Cohn are not res judicata on the question of the validity of the alleged Restrictive agreement, but state as a matter of law that the said cases are res judicata and further state that the decrees in said cases are still in full force and effect, not reversed or set aside and are binding on the said defendants and each of them as judgments by estoppel by verdict.

As to Paragraph 5 of said Rejoinder, these plaintiffs say that the said defendants and each of them are estopped from denying the execution, delivery, existence, compliance with the conditions precedent, validity and enforceability of said Restrictive Agreement by the judgment and decree of the Superior Court of Cook County, entered in the case of Burke v. Kleiman hereinbefore fully set forth in the plaintiffs' Reply and by the affirmance of said decree in the Appellate Court of Illinois; and state the fact to be that the said action was in fact and in law a representative and class action and these defendants object to the said Rejoinder and say that the allegations of said Rejoinder are immaterial, [fol. 358] irrelevant and incompetent for the reason that the decree in said Burke v. Kleiman cannot be collaterally attacked and further say that the Answer of said James Joseph Burke referred to in said Paragraph 5 is not evidence of the facts therein alleged by said James Joseph Burke. The plaintiffs further say that the remainder of the said Paragraph 5 of said defendants' Rejoinder is a repetition of matters heretofore put in issue by the pleadings in this case.

As to Paragraphs 7, 8, 9 and 10 these plaintiffs deny that

the said decrees heretofore mentioned, Burke v. Kleiman, Cook v. Yondorf and Penoyer v. Cohn were obtained by fraud or friendly arrangement or under circumstances which would make the same unavailable as res judicata and deny that the proceedings of the case of Burke v. Kleiman were a "dummy" proceeding or conceived in fraud to have the alleged Agreement declared valid.

As to Paragraphs 11 and 12 of said defendants' Rejoinder, these plaintiffs say that the said Rejoinder is as to the allegations therein, incompetent, irrelevant, immaterial and not a defense to the validity or enforceability of the said Restrictive Agreement.

And the plaintiffs therefore pray that the said Rejoinder and each and every part thereof, be stricken as incompetent, irrelevant and immaterial.

(Signed by attorneys for plaintiffs and verified July 29, 1938.)

OBJECTIONS OF PLAINTIFFS, FILED JULY 29, 1938, TO AMENDED REJOINDERS OF ISRAEL KATZ, FILED JULY 14, 1938

Now come the plaintiffs by Charles A. Churan, Schuyler & Hennessy and Angus Roy Shannon, their attorneys, and [fol. 359] object to the Amended Rejoinder of Israel Katz, filed herein on July 14, 1938 and say that said Rejoinder is immaterial, incompetent and irrelevant defense to the Reply of the plaintiffs heretofore filed and particularly the paragraphs of said Rejoinder as follows, to-wit:

As to Paragraph 1, in the pleadings have admitted that premises located 423 East 60th Street were occupied by colored persons prior to the filing of the original Complaint herein and have alleged that said premises were never restricted and say that it is immaterial whether the said premises are now owned by a colored person or not. They object to the allegation in regard to the twenty-four (24) apartment building at 423-7 East 60th Street and 6004-14 Vernon Avenue in the City of Chicago, Cook County, Illinois for the reason that the said premises were not occupied by colored persons at the time of the filing of the original Complaint herein but the plaintiffs are informed and believe the same to be true that some colored persons are occu-

pying some of the apartments of said building but that it is immaterial as far as this action is concerned whether or not the said apartment building is now occupied by colored persons.

As to Paragraph 2 plaintiffs have heretofore denied that the character of the neighborhood in which the defendant Katz's property is located has changed in respect to occupancy by white or colored persons and say that such defense is incompetent, immaterial and irrelevant for the reason that the very purpose of said Restrictive Agreement was to prevent the occupancy of defendant Katz's premises by negroes or colored persons.

[fol. 360] As to Paragraph 4 plaintiffs deny that the defendant Israel Katz did not execute said Restrictive Agreement and deny that he is not bound thereby and deny that his signature was obtained by trick, strategy, misrepresentation, or fraud as stated in his Answer; and as to the remainder of said Paragraph, these plaintiffs say that the allegations therein are not a proper defense to the enforcement of said Restrictive Agreement.

As to Paragraph 6 plaintiffs deny that the decrees in the cases of Burke v. Kleiman, Cook v. Yondorf and Penoyer v. Cohn were obtained by fraud and deny that the decree in Cook v. Yondorf was entered by consent, compromise or settlement.

As to Paragraph 8 plaintiffs deny that said Israel Katz is not in privity to or with the signers of said Restrictive Agreement, but allege the fact to be that said Israel Katz did sign and execute the said Restrictive Agreement.

As to Paragraph 10 plaintiffs deny that the decrees in Cook v. Yondorf and Burke v. Kleiman were obtained by fraud, collusion, consent or friendly arrangements between the respective attorneys for the parties in said suits, and deny that the only issue in the Burke v. Kleiman case was the question of whether or not three (3) or four (4) violations of the Restrictive Agreement constituted such a change in the character of the neighborhood as to make inequitable the enforcement of said Agreement; and further object to the allegations of said Paragraph 10 for the reason that the said decrees are in full force and effect and binding on the said defendant Katz, not reversed, reviewed or appealed from; and the plaintiffs say that the Answers of [fol. 361] said defendant Katz as alleged in Paragraph 10 of his said Amended Rejoinder are incompetent, irrelevant,

immaterial and not responsive in law to the Reply of the plaintiffs heretofore filed.

Plaintiffs object to Paragraphs 11 and 12 of the said defendant Katz's Amended Rejoinder and say that the same is incompetent, irrelevant, immaterial and a repetition of previous paragraphs of said Rejoinder.

And the plaintiffs move the Court that so much of said Amended Rejoinder as is incompetent, irrelevant and immaterial, and such matters as therein contained which allege matters which have occurred since the filing of the Complaint herein, be stricken.

(Signed by attorneys for plaintiffs and verified July 29, 1938.)

Decree entered by Judge Bristow August 19, 1938, shown in abstract of record, pages 102 to 125, inclusive.

MOTION OF PLAINTIFFS FILED SEPTEMBER 20, 1938, TO STRIKE PETITION OF DEFENDANTS TO VACATE DECREE

Motion to strike petition of certain defendants to vacate decree, etc.

Now come the plaintiffs by Charles A. Churan, Schuyler & Hemessy and Angus Roy Shannon, their attorneys, and move the Court to strike from the files and record the Petition filed by certain defendants on September 17, 1938 to vacate and set aside the Decree heretofore entered on August 19, 1938 and also move to deny said defendants' motion to vacate said Decree and their motion for new trial. [fol. 362] And for reasons for said motion the plaintiffs say:

First. Said Petition supported by Affidavit of Fred L. Helman, sworn to on August 16, 1938, is dilatory and made for the purpose of delaying the execution of the Decree.

Second. Defendants' time for supersedeas expired September 8, 1938; Helman's Affidavit dated August 16, 1938, defendants' motion not made in apt time. Setting aside Decree would prejudice plaintiffs' rights.

Third. The defense set up by the Affidavit is not only dilatory, but even if it were admitted to be true, is merely cumulative and adds nothing to defense, as the defense that the

Restrictive Agreement was not signed by the owners of ninety-five per centum (95%) of the frontage was alleged in the Answers of all defendants, was one of the main defenses in the case; evidence thereon was heard and considered by the Court and the Decree entered by the Court so recites.

Fourth. The Petition in effect seeks to set aside in a collateral proceeding the Decree entered in the Superior Court of Cook County in the case of Burke v. Kleiman, which has been in full force and effect for five (5) years and affirmed by the Appellate Court of Illinois, First District, since November 27, 1934, of which the defendants had notice and which is now invulnerable to attack.

Fifth. The affidavit of Fred L. Helman upon which said Petition is based, is contradictory and unreliable; that the Petition makes allegations of fraud purportedly based upon [fol. 363] said Affidavit which have no basis in fact when said Affidavit is examined.

Sixth. The Decree is proper, and not erroneous, and should not be vacated or set aside.

Wherefore, plaintiffs move that the Petition to vacate said Decree be stricken from the files and the motion to set aside and vacate said Decree be overruled and motion for new trial be denied.

(Signed by attorneys for plaintiffs and verified.)

Order Denying Motion to Vacate Decree etc.

Order entered September 29, 1938, by Judge Bristow, denying defendants' motion to vacate and set aside decree and their motion for a new trial.

Notice of Appeal

Notice of appeal is erroneously abstracted in that it includes Jay B. Crook and Hallie C. Crook as appellants, but said defendants Jay B. Crook and Hallie C. Crook do not join in notice of appeal and are not appealing from the decree.

Statement of Evidence

EVA SOMERMAN, a witness for the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

My full name is Eva Somerman; I live at 8218 Indiana Avenue; am married, husband's name, Sam Somerman; we lived at and owned property at 6140 Rhodes Avenue; we bought property in 1919 from Mr. Greenhut and Rose Greenhut, his wife, at two different times; don't remember the date. Bought second half year later, also from Paul Greenhut and Rose Greenhut, his wife; obtained deeds and gave them to Mr. Stoltz of the First National Bank of Englewood.

[fol. 364] Mr. Churan: If the Court please, I have an affidavit that we are unable to produce these documents and certain other documents and are asking leave to introduce certified copies. Affidavit alleges it is not in the power of the plaintiffs to produce the documents. I am asking that this affidavit be marked, "Plaintiffs' Exhibit 1."

I now ask counsel to produce these deeds. I have served notice on counsel to produce and ask to have this notice marked and introduced in evidence as, "Plaintiffs' Exhibit 2."

(Said documents so offered and received in evidence were marked, "Plaintiffs' Exhibits 1 and 2.")

PLAINTIFFS' EXHIBIT 1

Affidavit of Charles A. Churan, recites that he is one of the attorneys for the plaintiffs and that it is necessary on the hearing to produce certain deeds and documents or certified copies thereof; that the original deeds and documents, all of which have been acknowledged and recorded, are not in the power of the plaintiffs to produce the same; that they have not been intentionally destroyed or in any manner disposed of and affiant makes this affidavit for the purpose of receiving in evidence following deeds and documents, to wit:

(1) Quit-claim deed from Jay B. Crook to Carl A. Hansberry and Nannie L. Hansberry, his wife, recorded May 27, 1937 as Document 12003884.

(2) Quit-claim deed from the First National Bank of Englewood to Jay B. Crook, recorded May 26, 1937 as Document 12003437.

[fol. 365] (3) Warranty deed from Paul Greenhut and wife to Eva Somerman, dated March 11, 1919, recorded as Document 6478695.

(4) Warranty deed from Paul Greenhut and wife to Eva Somerman, recorded March 3, 1920 as Document 6750912.

(5) Warranty deed from Laura B. Stebbings to Israel Katz, dated September 2, 1924, recorded as Document 8578456.

(6) Warranty deed from Robert J. Rosenberg and wife to Israel Katz and wife, recorded March 1, 1935 as Document 11576513.

(7) Trust deed dated May 19, 1937 from Jay B. Crook and wife to Chicago Title & Trust Company, recorded as Document 12003438.

(8) Trust deed from Edward E. Parrish and wife to Chicago Title & Trust Company, recorded May 1, 1937 as Document 11989725.

(9) Quit-claim deed from Walter J. Harrower and wife to Henry Aloysius Lutz, recorded April 21, 1937 as Document 11983900.

(10) Quit-claim deed from Henry Aloysius Lutz and wife to Edward E. Parrish, recorded April 21, 1937 as Document 11983901.

(11) Quit-claim deed from Edward E. Parrish and wife to Harry H. Pace, recorded June 12, 1937 as Document 12011704.

Affidavit verified March 5, 1938.

[fol. 366] PLAINTIFFS' EXHIBIT 2

Notice served on attorney Stradford to produce:

(1) Quit-claim deed from Jay B. Crook and wife to defendants, Carl A. Hansberry and wife, dated May 27, 1937,

recorded May 27, 1937 as Document 12003884 for conveyance of premises commonly known as 6140 Rhodes Avenue.

(2) Quit-claim deed from First National Bank of Englewood to Jay B. Crook, dated May 15, 1937, recorded May 26, 1937 as Document 12003437 for conveyance of same premises.

(3) Real estate contract between First National Bank of Englewood, as vendor, and Jay B. Crook, as vendee, for purchase of same premises.

(4) Warranty deed from Paul Greenhut and wife to Eva Somerman, dated March 11, 1919, recorded as Document 8478695 for conveyance of undivided one-half (½) interest in same premises.

(5) Deed from same grantors to same grantee, dated February 13, 1920, recorded March 3, 1920 as Document 6750912 for conveyance of undivided one-half (½) interest in the same premises.

Mr. Churan: I ask counsel to produce these deeds. Counsel say they are not in their possession and cannot produce them.

EXHIBIT 3

Plaintiffs offer in evidence certified copy of deed from Paul Greenhut and wife to Eva Somerman for undivided one-half of: Lot Twenty-seven (27) in Block Two (2) in re-[fol. 367] subdivision of Blocks Eleven (11) and Twelve (12) in the resubdivision of Washington Park Club Addition to Chicago, etc., being the deed for premises No. 6140 Rhodes Avenue, Chicago; said deed dated March 11, 1919, signed and sealed by Paul Greenhut and Rose Greenhut; acknowledged March 11, 1919, and filed for record in the recorder's office March 11, 1919 as Document No. 6478695.

(Document received in evidence as "Plaintiffs' Exhibit 3.")

EXHIBIT 4

Plaintiffs offer in evidence as "Plaintiffs' Exhibit 4" warranty deed from Paul Greenhut and wife to Eva Somer-

man, to the same property, being the other undivided one-half of property described in "Plaintiffs' Exhibit 3." Deed dated February 13, 1920, acknowledge same date recorded March 3, 1920, as Document No. 6750912.

(Deed received in evidence as "Plaintiffs' Exhibit 4.")

The Witness: We lived in that property eighteen years and moved last year in May, 1937, I think it was about May 18th. We did not own property during the whole time. We sold it in 1933 to the First National Bank of Englewood; deed was made to Mr. Stoltz.

(Witness identifies photostatic certified copy of deed from herself and husband to Joseph D. Stoltz.)

EXHIBIT 6

Plaintiffs offer in evidence certified copy of quit-claim deed from Eva Somerman and husband to Joseph D. Stoltz for the whole of said Lot Twenty-seven (27) in Block Two [fol. 368] (2), etc. Deed dated March 30, 1933, acknowledged same date, recorded March 31, 1933.

(Said document received in evidence as "Plaintiffs' Exhibit 6.")

Mr. Churan: Mrs. Somerman, I now show you "Plaintiffs' Exhibit 5" for identification. I ask you if your signature is on page 14 of this document?

The Witness: Yes, that is my signature and my husband's signature on "Plaintiffs' Exhibit 5" for identification. The property has never been occupied by colored people since we signed the Agreement. This was a three-flat building and basement. My neighbors were Govanus and Patrick T. Burke on each side. They were our neighbors most of the time. The buildings in that block between 61st and 62nd on Rhodes Avenue are mostly two-flat buildings.

Both sides of the street were completely occupied by buildings. None of those buildings were ever occupied or owned by colored people.

Cross-examination.

By Mr. Stradford:

It is so long since we signed this document (referring to "Plaintiffs' Exhibit 5" for identification), I don't remember who were present at the time. Someone brought it to my home. My husband and I were both present. I do not remember what was said at the time this instrument, marked "Plaintiffs' Exhibit 5" was presented to me. It is so long ago.

I don't know who presented it to me. He knows me, maybe. I know he belonged to the Woodlawn Association. [fol. 369] I don't know what is meant by the word, "acknowledgment." I didn't go through any formality in signing it or acknowledging it.

EXHIBIT 7

Mr. Churan: I now offer in evidence as "Plaintiffs' Exhibit 7" certified copy of deed from Joseph D. Stoltz to First National Bank of Englewood, dated March 31, 1933, for the same property; also the acknowledgment thereof and certificate of recordation on April 27, 1933, as Document 11228579.

(Document so offered received in evidence as "Plaintiffs' Exhibit 7.")

Defendants' abstract of record does not show that the following witnesses were called as witnesses for the plaintiffs and before testifying were duly sworn. The names of the witnesses and pages at abstract are as follows:

(Abst. 129) Esther D. Govans, (Abst. 129) Louise G. Anderson, (Abst. 134) Anna M. Lee, (Abst. 136) Arthur H. Olsen, (Abst. 814) Edwin D. Johnson (Abst. 138) William J. O'Brien, (Abst. 141) H. D. Ludlow, (Abst. 143) Henry Aloysius Lutz, (Abst. 146) Mary A. Burke, (Abst. 148) George F. Anderson, (Abst. 132) Arthur A. Basse, (Abst. 151) Hartzell Given, (Abst. 152) Frank X. Strobel, (Abst. 153) Moslin M. Cannon, (Abst. 156) Mae F. Churan, (Abst. 158) James J. Carroll, (Abst. 162) Leo T. Heid, (Abst. 163) George L. Griffin, (Abst. 167) Mary R. Pyle,

(Abst. 168) Harry E. Raymond, (Abst. 160) George Washington Cook, (Abst. 70) Joseph Bonnefoi, (Abst. 172).

Defendants' Abstract of Record also fails to show that defendants Harry H. Pace (Abst. 174), Jay B. Crook (Abst. 186), Carl A. Hansberry (Abst. 195) were called by the [fol. 370] plaintiffs as witnesses to be examined under Section 60 of the Statute.

EXHIBIT 8

Notice served on Attorney Basse to produce: (1) Deed from First National Bank of Englewood to Jay B. Crook, dated May 15, 1937, recorded May 26, 1937 as Document No. 12003437, (2) Real Estate Contract between First National Bank of Englewood and Crook for purchase by Crook of 6140 Rhodes Avenue.

Mr. Basse: I don't have the deed.

Notice received in evidence as "Plaintiffs' Exhibit 8".

EXHIBIT 9

Plaintiffs offer in evidence as "Exhibit 9" Deed from First National Bank of Englewood to Jay B. Crook for property 6140 Rhodes Avenue, Chicago, therein described as: Lot Twenty-seven (27) in Block Two (2) in Resubdivision of Blocks Eleven (11) and Twelve (12) in the Resubdivision of Washington Park, etc.; Deed dated May 15, 1937, and recorded May 26, 1937, as Document No. 12003437.

(Deed received in evidence as "Plaintiffs' Exhibit 9".)

ESTHER W. GOVANUS, one of the plaintiffs, being duly sworn, testified (p. 750):

Plaintiff Esther D. Govanus identifies signatures of her husband and herself on page 14 of "Plaintiffs' Exhibit 5" for identification.

LOUISE G. ANDERSON, plaintiff, identifies her signature on page 17 of "Plaintiffs' Exhibit 5" for identification, Parcel No. 273.

[fol. 371] ANNA M. LEE, one of the plaintiffs, identifies the signatures of herself and her deceased husband on page 14 of "Plaintiffs' Exhibit 5" for identification.

We call on counsel for Hansberry to produce the deed for Jay B. Crook to Carl A. Hansberry and wife.

Mr. Stratford: I haven't got it.

The Court: Let the records show that he hasn't got it so that you can produce secondary evidence.

Mr. Churan: I served notice on counsel (Dickerson and Gibson) to produce trust deed from J. B. Crook and wife to Chicago Title & Trust Company to secure principal note for $4400.00 on property No. 6140 Rhodes Avenue.

Mr. Gibson: We don't have that.

EXHIBIT 10

Notice on Dickerson and Gibson, attorney for Harry H. Pace and Supreme Liberty Life Insurance Company received in evidence as Plaintiffs' Exhibit 10 to produce:

(1) Trust Deed on 6140 Rhodes Avenue from Crook to Chicago Title & Trust Company, dated May 19, 1937,

(2) Principal Note, dated May 19, 1937, executed and delivered by Jay B. Crook and wife to Supreme Liberty Life Insurance Company for $4400, payable to bearer in monthly installments of $40,

(3) Trust Deed from Parrish and wife to Chicago Title & Trust Company, dated April 27, 1937 on 413 E. 60th Street to secure principal note for $3500,

(4) Principal Note dated April 27, 1937 for $3500, executed and delivered by Edward E. Parrish and wife to said [fol. 372] Insurance Company, payable $35 per month,

(5) Quitclaim Deed from Henry A. Lutz and wife to Edward E. Parrish, dated April 19, 1937 recorded April 21, 1937,

(6) Quitclaim deed from Walter J. Harrower and wife to Henry A. Lutz for premises 413 E. 60th Street,

(7) Quitclaim Deed from E. E. Parrish to Harry H. Pace to 413 E. 60th Street, dated May 17, 1937, recorded June 12, 1937,

(8) Real Estate Contract between Walter J. Harrower and wife and Henry A. Lutz for purchase of premises by Lutz of 413 E. 60th Street.

EXHIBIT 11

Plaintiffs offer in evidence certified copy of trust deed from Jay B. Crook and wife to Chicago Title & Trust Company, conveying premises 6140 Rhodes Avenue, including acknowledgment and recordation thereof.

(Document received in evidence as Plaintiffs' Exhibit 11, which document is as follows:)

Trust Deed dated May 19, 1937 from Jay B. Crook and Hallie C. Crook, his wife, to Chicago Title & Trust Company, as trustee, wherein the said Jay B. Crook and wife admitted to be justly indebted to the legal holder of note for $4400.00 payable to bearer in installments of $40.00 per month with interest at six per cent per annum, both principal and interest payable at the office of the Supreme Liberty Life Insurance Company, 3511 South Parkway, Chicago, on premises described as—

Lot 27 in Block 2 in Re-Subdivision of Blocks 11 and 12 in Re-Subdivision of the Washington Park Club Addition to Chicago etc.,

[fol. 373] commonly known as 6140 Rhodes Avenue, Chicago, Illinois; acknowledged by said Jay B. Crook and Hallie C. Crook, his wife, before Earl B. Dickerson, a Notary Public, on May 19, 1937, and filed for record in the Recorder's Office of Cook County, on May 26th, 1937, in Book 33234, page 416, as Document No. 12003438, and also endorsed in writing on the outside, as follows:

Mail to: Earl B. Dickerson,
35 S. Dearborn Street, Chicago.

Mr. Churan: I call on Counsel Dickerson and Gibson to produce the principal note for $4400.00 secured by said trust deed.

Mr. Gibson: We don't have that. You can prove it by secondary evidence.

Mr. Churan: How can we prove it. It is in your possession and not recorded.

Mr. Gibson: It is a bearer note and we don't admit we have it.

Mr. Churan: I served notice on you to produce it.

Mr. Shannon: You mean you don't have it or you don't produce it?

Mr. Gibson: We don't produce it.

EXHIBIT 13

Plaintiffs offer in evidence Quitclaim Deed from Jay B. Crook and Hallie C. Crook to Carl A. Hansberry and Nannie L. Hansberry, his wife, as joint tenants, and not as tenants in common, conveying all interest in the following described real estate, to-wit:

Lot 27 in Block 2 in Re-Subdivision of Blocks 11 and 12 in Re-Subdivision of the Washington Park Club Addition [fol. 374] to Chicago, in the South Half of the Southeast Quarter of Section 15, Township 38 North, Range 14, East of the 3rd Principal Meridian,

also known as 6140 Rhodes Avenue, Chicago, Illinois, dated May 27th, 1937; acknowledged on May 27, 1937 by the grantors, before F. O. Washington, as Notary Public, and recorded on May 27, 1937, in the Recorder's Office of Cook County, as Document No. 12003884.

(Said document received in evidence as Plaintiffs' Exhibit 13.)

EDWIN D. JOHNSON, a witness called on behalf of the plaintiff, being duly sworn, testified, in addition to what is shown in defendants' abstract of record (pages 138 to 141), as follows:

Witness is shown Plaintiffs' Exhibit 5 for identification and asked if he is acquainted with the signature of Walter J. Harrower. He answered, "Yes, this is my cousin, Walter J. Harrower's signature on Plaintiffs' Exhibit 5 for identification here on page 24; he was the owner of Parcel No. 472."

EXHIBIT 14

Plaintiffs offer in evidence Original Real Estate Contract, signed by Walter J. Harrower, as seller, and Henry Aloysius Lutz, as purchaser, and witnessed by James Joseph Burke, as witness, dated the 5th day of March, 1937, for the conveyance of the premises at 413 E. 60th Street, Chicago, described as,

Lot 7 in Block 1 in John J. Mitchell's South Park Subdivision of Blocks Nine (9), Ten (10) and Eleven (11) in [fol. 375] Maher's Subdivision of the Southeast Quarter (S.E.¼) of Section 15, Township 38 North, Range 14, East of the Third Principal Meridian,

consideration for sale, $3000.00 subject among other things to building lines and building and liquor restrictions of record, showing a deposit of $500.00 as earnest money to be applied on purchase price, and purchaser agrees to pay within five days after the title is shown good the further sum of $2500.00 at the office of Johnson Realty Company, 11109 Longwood Drive, Chicago.

(Said document received in evidence as Plaintiffs' Exhibit 14.)

EXHIBIT 15

Certified copy of deed from Walter J. Harrower and wife to Henry Aloysius Lutz for the premises described in said abstract Exhibit 14, being premises 413 E. 60th Street, Chicago, said deed being dated April 14, 1937, consideration being $10.00 and other good and valuable considerations, bearing revenue stamps for $3.00 and acknowledged by the grantors on April 16, 1937 before E. D. Johnson, as Notary Public, and filed for record in the Recorder's Office, April 21, 1937, at 1:48 P. M. as document No. 11983900, also endorsement on the title page thereof, as follows:

Mail To: Henry Aloysius Lutz, 415 S. Franklin St., City.

(Said deed received in evidence as Plaintiffs' Exhibit 15.)

Mr. Churan: We call on counsel to produce the deed from Henry A. Lutz and wife to Edward E. Parrish.
[fol. 376] Mr. Dickerson: I have no such deed. I don't know Parrish.

EXHIBIT 16

Certified copy of Quitclaim Deed, dated April 19, 1937 from Henry Aloysius Lutz and wife of Chicago, to Edward E. Parrish, of the City of Chicago, County of Cook and State of Illinois, conveying premises commonly known as premises at No. 413 E. 60th Street, Chicago, and described herein as

Lot Seven (7) in Block One (1) in John J. Mitchell's South Park Subdivision of Blocks Nine (9), Ten (10) and Eleven (11) in Maher's Subdivision of the South East Quarter (S.E.¼) of Section 15, Township 38 North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois,

and acknowledged on April 19, 1937, by the grantors before Thomas F. Brennan, as Notary Public, and recorded April 21, 1937, at 1:48 P. M. in the Recorder's Office of Cook County, as Document No. 11983901 and endorsed on the title page thereof in writing, as follows:

Mail To: Edward E. Parrish, 59 W. 10th Street, New York City, N. Y.

(Offered and received in evidence as Plaintiffs' Exhibit 16. Said deed recites consideration less than One Hundred Dollars and bears no revenue stamps.)

EXHIBIT 17

Plaintiffs offer in evidence Trust Deed from Edward E. Parrish and wife of the City of New York, County of New York and State of New York, to Chicago Title & Trust Company, as trustee, to secure their indebtedness in the principal sum of Thirty-five Hundred Dollars ($3500.00), secured by a certain principal installment note of said Edward [fol. 377] E. Parrish and Aeolian H. Parrish, his wife, payable in installments of $35.00 per month with interest at five and one-half per cent per annum; said principal and interest payable at the office of Supreme Liberty Life Insurance Company, a corporation, 3511 South Parkway, Chicago, conveying said Lot 7 in Block 1, in John J. Mitchell's South Park Subdivision; said trust deed signed and sealed by the grantors on the 22nd day of April, 1937, and acknowledged

by them before Isaac Ginsburg, a commissioner of deeds, in and for the County of New York and State of New York, on April 27, 1937, and filed for record in the Recorder's Office of Cook County on May 1, 1937, as Document No. 11989725, and bearing the endorsement on the title page, as follows:

Mail to: Earl B. Dickerson, 35 S. Dearborn St., Chicago.

Said certified copy of Trust Deed received in evidence as Plaintiffs' Exhibit 17.

Mr. Churan: I now call on counsel to produce deed from Edward E. Parrish and wife of the City of New York and State of New York, to Harry H. Pace, dated May 17th, 1937, conveying property Number 413 E. 60th Street, Chicago, to said Pace.

Mr. Dickerson: I don't have it. I never had it.

EXHIBIT 19

(Whereupon plaintiffs offered in evidence certified copy of Quit Claim Deed dated May 17th, 1937, from Edward E. Parrish and Aeolian H. Parrish, his wife, of the City of New York and State of New York, to Harry H. Pace, of Chicago, to property legally described therein as):

[fol. 378] Lot Seven (7) in Block One (1), John J. Mitchell's South Park Subdivision, commonly known as 413 E. 60th Street, Chicago,

and acknowledged May 18th, 1937, by the grantors before Isaac Ginsburg, a Commissioner of Deeds in and for the County of New York and State of New York, and filed for record in the Recorder's Office of Cook County, Illinois, on June 12th, 1937, as Document No. 12011704 and bearing the endorsement on the title page thereof:

Mail to: Harry H. Pace, 413 E. 60th Street, Chicago, Illinois.

(Said Document received in evidence as Plaintiff's Exhibit 19.)

Mr. Churan: I call on Counsel to produce the abstract to 413 E. 60th Street.

Mr. Dickerson: I am sure I don't have it. I never have seen the abstract, I don't believe.

GEORGE F. ANDERSON, a witness called on behalf of plaintiffs, being duly sworn, testified as is shown in Abstract of Record, commencing at pages 908 to 927.

Witness identified the escrow agreement entered into at the Chicago Title & Trust Company office in reference to the property at 6140 Rhodes Avenue, Chicago.

EXHIBIT 20

(Whereupon, Plaintiffs offered in evidence escrow agreement dated April 21, 1937, Escrow No. 106146, between the First National Bank of Englewood and Jay B. Crook) and Supreme Liberty Life Insurance Co. in relation to

[fol. 379] Lot Twenty-seven (27) in Block Two (2) in Re-Subdivision of Blocks Eleven (11) and Twelve (12) in the Re-Subdivision of the Washington Park Club Addition,

the same being premises at No. 6140 Rhodes Avenue. Said escrow recites that said First National Bank of Englewood deposits Quit Claim Deed of Jay B. Crook and Arthur A. Basse deposits check for One Thousand Dollars and Trust Deed dated May 19, 1937, conveying said premises and note for $4400.00, and that Earl B. Dickerson deposits check for $4400.00, the same being proceeds of note secured by said Trust Deed and that Arthur A. Basse also deposits the sum of $525.00. Said Escrow Agreement is signed by Earl B. Dickerson, Arthur A. Basse, and by the First National Bank of Englewood, by Anderson and Anderson.

Said Escrow Agreement is received in evidence as Plaintiffs' Exhibit 20.

Letter from Anderson and Anderson, dated May 27th, 1937, to Chicago Title & Trust Company, offered and received in evidence as Plaintiffs' Exhibit 21.

That part of letter permitted to be received in evidence, is as follows:

[fol. 380] EXHIBIT 21

Anderson & Anderson

Attorney-At-Law

69 West Washington St., Chicago

Chicago Title & Trust Co., 69 W. Washington St., Chicago, Ill.

In Re Escrow No. 106146

DEAR SIRS:

We represent the First National Bank of Englewood, the vendor under the above Escrow Agreement. The property involved is a three apartment building, commonly known as 6140 Rhodes Avenue. It is in the Washington Park Addition to Chicago. This Addition has a covenant against the selling or leasing to negroes * * * We therefore notify you not to accept the additional balance of $5500.00 due under such escrow agreement and not deliver the deed under said escrow, and not to consummate said escrow.

Very truly yours, Anderson & Anderson, by George F. Anderson.

This letter received in evidence as Plaintiffs' Exhibit 21.

[fol. 381] MARY A. BURKE testified that she lives at 6136 Rhodes Avenue, next door to the Hansberry property.

"My father built our place. I am familiar with my father's signature and this is his signature here on page 14 of 'Plaintiffs' Exhibit 5' for identification. 263 is the Parcel No."

"We had a tenant for one of the apartments to take possession on June 1st, 1937. When he found out that Hansberry moved into the property next door, he refused to move in and the apartment is now vacant."

FRANK X. STROBEL, a witness for plaintiffs, and the owner of property at 6112 Vernon Avenue in Washington Park Subdivision for twenty (20) years and owner of that property on the 1st of February, 1928, and one of the signers of

the Restrictive Agreement, identified his signature on page 19 of "Plaintiffs' Exhibit 5."

HARTZELL GIVEN, being first duly sworn, testified as a witness for the plaintiffs, as shown in Abstract of Record.

Witness identified Escrow Agreement (Plaintiffs' Exhibit 20) as part of files of Chicago Title & Trust Company; also Plaintiffs' Exhibit 21, as part of the Escrow file. Witness also identified as part of the file paper signed by James Joseph Burke, dated April 21, 1937, which is as follows:

[fol. 382] EXHIBIT 22

5/21/'37.

Received of Jay B. Crook, Three Hundred Twenty-five Dollars ($325.00), my commission on sale property, 6140 Rhodes Avenue, Chicago.

James Joseph Burke.

(Said writing offered and received in evidence as Plaintiffs' Exhibit 22.)

JAMES J. CARROLL, called as a witness on behalf of the Plaintiff, being duly sworn, testified as shown in Abstract, Pages 162 to 166, inclusive.

Witness identified plat of Washington Park Subdivision, being territory between South Park Avenue on the west, Cottage Grove on the East, Sixtieth Street on the north, and Sixty-third Street on the south.

Mr. Churan: I offer this (plat) in evidence as Plaintiffs' Exhibit 23.

The Court: I understand it goes in by Agreement.

Mr. Stratford: All right.

(Document making Washington Park restricted area received in evidence, as Plaintiffs' Exhibit 23, and is reproduced on the following page.)

(Here follows one photolithograph, side folio 383.)

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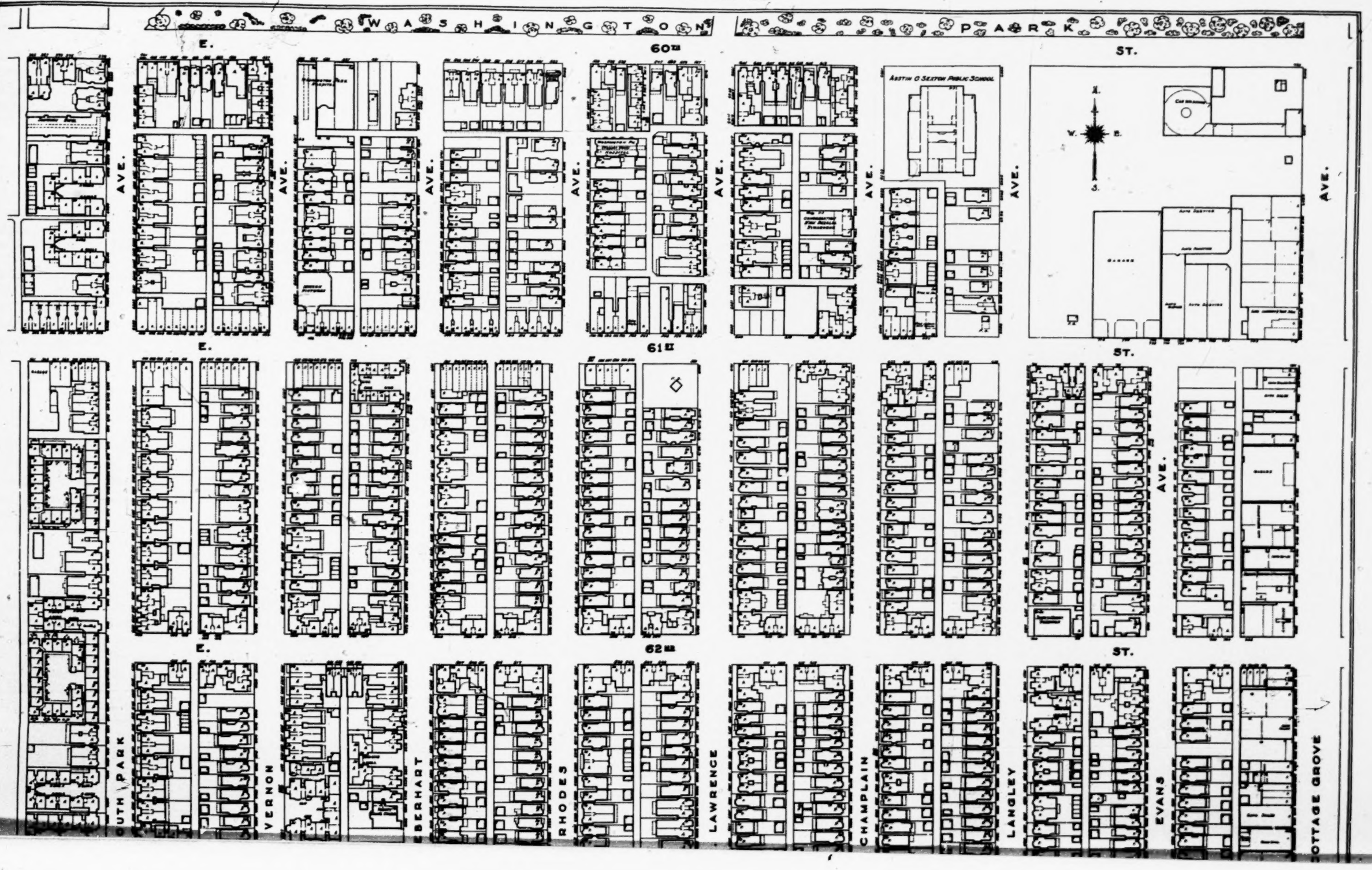
EXHIBIT 23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E.
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AUSTIN O SLETTON PUBLIC SCHOOL
SOUTH PARK
VERNON
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RHODES
LAWRENCE
CHAMPLAIN
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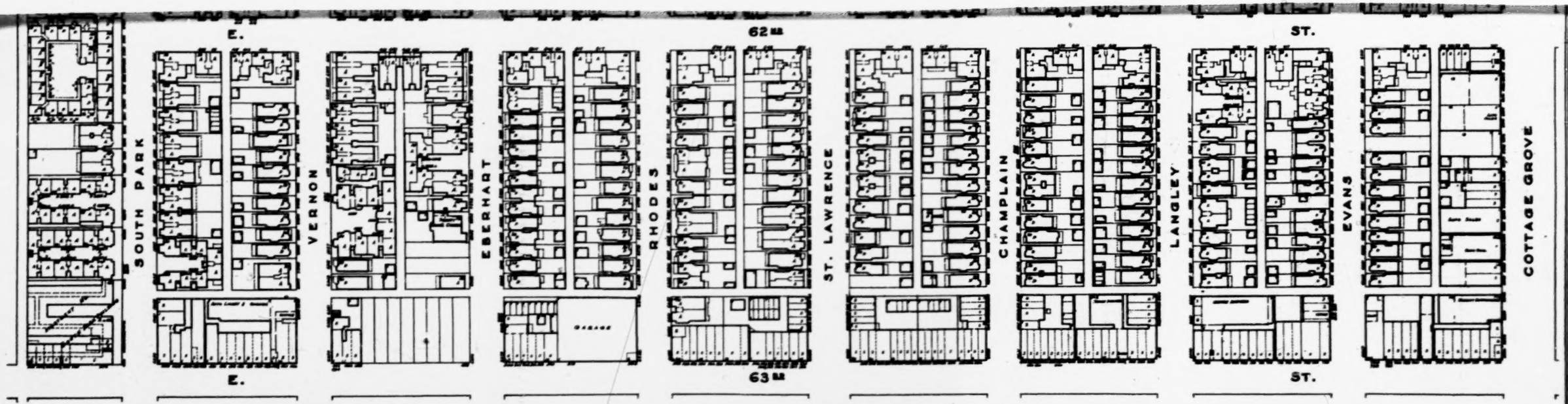

WASHINGTON - PARK - RESTRICTED - AREA

383

SCALE - 1" = 50'-0"

E.J.M. 12-12-34

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[fol. 384] EXHIBIT 25

Writ of Assistance issued May 7th, 1937, out of the office of the clerk of the Circuit Court in the case of Plath v. DeLaunty, et al., Case No. 35 C 8078, directed to the Sheriff of Cook County to dispossess Ruth Hoffman and N. L. Hansberry (identified as Carl A. Hansberry) from the first floor building No. 549 East Sixtieth Street, Chicago, offered and received in evidence as Plaintiffs' Exhibit 25.

EXHIBIT 26

Printed Abstract of Record filed in the Appellate Court in Plath v. DeLaunty, by C. Francis Stratford, as attorney for appellant, Ruth Hoffman, offered and received in evidence as Plaintiffs' Exhibit 26, showing the following:

Order entered in Plath v. DeLaunty, November 10, 1936, by Judge Joseph Burke, granting writ of interference to the receiver to dispossess Hoffman and Hansberry from first floor of 541 East Sixtieth Street, Chicago, and also showing notice of appeal to Appellate Court and Answer of Ruth Hoffman, admitting that she is a white woman.

EXHIBIT 12

Principal Note signed by Jay B. Crook and Hallie C. Crook for $4400.00, dated May 19, 1937, payable in installments of $40.00 per month at the office of Supreme Life Insurance Company, offered and received in evidence, as Plaintiffs' Exhibit 12.

EXHIBIT 18

Principal Note signed by Edward E. Parrish and Aeolian A. Parish, of New York City, dated April 22, 1937, for $3500.00, payable in monthly installments of $35.00 per month at the office of Supreme Liberty Life Insurance Company, Chicago, offered and received in evidence as Plaintiff's Exhibit 18.

EXHIBIT 27

Certified copy of records, to-wit:

Bill, Answers of Defendants and Decree in the case of Olive Ida Burke v. Isaac Kleiman, et al.
[fol. 385] Supreme Court of Cook County, Case No. 567687, offered and received in evidence as Plaintiffs' Exhibit 27.

(This certified copy of the records in Burke v. Kleiman is the same Bill of Complaint, Answers of Isaac Kleiman, Sam Kleiman, James L. Hall and Charles J. Sopkin, and Decree entered in the Superior Court, October 2, 1933, in said case, heretofore shown as part of Reply of plaintiff's pages 16 to 57 of this additional abstract.)

Certificate of Clerk of the Superior Court, dated December 16, 1937, certifying the said documents as true and correct copies of the said record.

EXHIBIT 28

Opinion of Justice Scanlan of the Appellate Court of Illinois, First District, handed down November 27th, 1934, in the case of Olive Ida Burke v. Isaac Kleiman, et al., General Number 37522, offered and received in evidence as Plaintiffs' Exhibit 28.

(Opinion appears in full, involving this very same restrictive agreement in 277 Illinois Appellate, page 519.)

EXHIBIT 29

(1220 Mandate of Appellate Court of Illinois, First District, affirming the decree in Burke v. Kleiman, issued December 8, 1934, offered and received in evidence, as Plaintiff's Exhibit 29.)

EXHIBIT 30

Certified copy of Agreed Stipulation of facts in case of Burke v. Kleiman in the Superior Court, Case No. 567687,

filed June 7, 1933, offered and received in evidence as Plaintiffs' Exhibit 30.

Said stipulation of facts appears in Abstract of Record, pages 65-66, except paragraph 15, which reads as follows:

15. "Nothing in this stipulation contained shall be deemed to be an admission by either plaintiff or defendant as to the [fol. 386] material, relevancy or competency of any of the facts herein stipulated and the aforesaid stipulation of facts shall not prevent either party from offering other or further evidence on the issues which may be material, relevant or competent.

(Signed) H. E. Raymond, Solicitor for Complainant,
(Signed) Charles J. Sopkin, Solicitor for Defendants, Kleiman, Hall & Sopkin.

Filed, June 7, 1933. Frank V. Zintak, Clerk.

Joseph P. Sheedy, a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Churan:

My full name is Joseph P. Sheedy, I live at 3642 West 60th Place. I am a night watchman for the Kane Service at the present time. I was connected with the Woodlawn Property Owners Association from October 1927 to February 1, 1928. I have looked over documents, marked "Plaintiffs' Exhibit 5" for identification, which I compiled. The document is in the same condition as it was when it was recorded with the exception that it is not as bright. Mr. Helman and I recorded it. Well, being a real estate broker, the Chicago Real Estate Board asked me to compile the legal description, which I did from the tract book itself in Selz & Southman's office, the legal description of every piece [fol. 387] of property in Washington Park Race Track. Each piece of property had a number. Each signature had a number, the same number for the particular piece of property, and the notary public's signature with the same number for the same parcel of property, "Plaintiffs' Exhibit 5C" is the list of names and the numbers of their position on the recorded document.

I have seen "Plaintiffs' Exhibits 5A and 5B" before. "Plaintiffs' Exhibits 5A and 5B" were recorded on the same day that "Exhibit 5" for identification was recorded. "Plaintiffs' Exhibit 5C" was recorded on February 1, 1928, the same day that the others were recorded. I was one of the notaries that took the acknowledgments on documents "5A" and "5B". There were quite a number of these. My name is here. I knew Mr. Fred L. Helman and Mr. Albert Davidson. Mr. Helman was Secretary of the Woodlawn Property Owners Association at the time, Mr. Davidson was his assistant, and I was the notary.

Cross-examination.

By Mr. Stradford:

I said I was connected with the Woodlawn Property Owners Association from about the 6th or 7th of October, until February 1, 1928. I lived at 3741 64th Street at that time. That is not the same place that I live now. The Woodlawn Property Owners Association office was just east of the little theatre there on 61st. I did not spend most of my time at the office. I called on property owners. I went alone. Well, I went with the Reverend Father Gilmartin, and the Jewish Rabbi a couple of times, most of the time I went alone. I went about meeting the property owners in this way, we had a sample copy that the Chicago [fol. 388] Real Estate Board gave to us to take along. I can't remember the exact wording but, it said on copy in big print, "Compiled by the Chicago Real Estate Board, and endorsed by—" I forgot who they were, but endorsed by business men. That was on the outside of the document, and the particular district that I personally was working in. And I showed them the document, to each property owner or owners, according to the legal description which I got from Selz & Southman's office. I would then tell them what the agreement was, that the neighbors agreed among themselves not to rent, sell or lease to anyone but those of the Caucasian race. I showed them the signatures and asked them to sign, and answered their questions. I did that in all the blocks that I covered.

Mr. Churan: We offer the documents identified by the witness in evidence, now, as Plaintiffs' Exhibits 5, 5-A,

5-B, and 5-C, and ask to have them so marked, together with the indorsement of the Recorder of Deeds.

(Objected to by Mr. Mollison, Abstract 197.)

(Said documents received in evidence as Plaintiffs' Exhibits 5, 5-A, 5-B, and 5-C, which are as follows:)

Plaintiffs' Exhibit 5, consisting of 29 pages, being the restrictive agreement bearing the Recorder's stamp, being filed February 1, 1928 and recorded in Book 25255, on pages 5 to 31, both inclusive, as Document 9914711.

Plaintiffs' Exhibit 5-A, consisting of 61 pages of notaries acknowledgment of signers of Plaintiffs' Exhibit 5.

[fol. 389] Recorder's stamp, showing filing February 1, 1928, in Book 25255, pages 53 to 116, both inclusive, as Document 9914713.

Plaintiffs' Exhibit 5-B, notaries acknowledgments of the signers of Plaintiffs' Exhibit 5, showing 72 pages of certificates, four to a page.

Recorder's stamp, showing filing of Exhibit 5-B, on February 1, 1928, in Book 25525, pages 117 to 188, both inclusive as Document 9914714.

Plaintiffs' Exhibit 5-C, showing names of owners, parcel numbers of properties and legal description of properties with street and street numbers of same, total number of parcels shown on this Exhibit being 559.

Recorder's stamp showing filing of Plaintiffs' Exhibit 5-C, on February 1, 1928, and recordation in Book 25255, Pages 32 to 52, both inclusive, as Document 9914712.

(There being 184 pages to Plaintiffs' Exhibits 5, 5A, 5B and 5C, plaintiffs have inserted in the Additional Abstract marked Vol. II of Exhibits, planograph copies of the pages of said documents which are material to this case as specimen pages of said documents as follows:)

Planograph copy of page 14 of plaintiffs' Exhibit 5 shows signatures of Eva Somerman as owner of Parcel No. 264; plaintiffs Edward L. Govanus and Esther Govanus as owners of Parcel No. 263; plaintiff Anna M. Lee and Hugh S. Lee, her husband, as owners of Parcel No. 267; and Patrick T. Burke, (Addl. Abst. Vol. II of Exhibits).

Also planograph copy of page 17 of Plaintiffs' Exhibit 5, showing signature of plaintiff Louise G. Anderson and her [fol. 390] husband as owners of Parcel No. 273 (Addl. Abst. Vol. II of Exhibits).

Also planograph copy of page 19 of Plaintiffs' Exhibit 5 showing signatures of Israel Katz and his wife as owners of Parcel No. 481 (Addl. Abst. Vol. II of Exhibits).

Also planograph copy of page 24 of Plaintiffs' Exhibit 5 showing signature of Walter J. Harrower as owner of Parcel No. 472 (Addl. Abst. Vol. II of Exhibits).

(a) Planograph copy of page 1 of Plaintiffs' Exhibit 5A being notary's certificate acknowledgment of signatures of Eva Somerman and Sam Somerman (Addl. Abst. Vol. II of Exhibits).

(b) Planograph copy of page 7C of Plaintiffs' Exhibit 5B showing notary's certificate of acknowledgment of plaintiffs Edward L. Govanus and Esther Govanus (Addl. Abst. Vol. II of Exhibits).

(c) Planograph copy of page 19C of Plaintiffs' Exhibit 5B showing notary's certificate of acknowledgment of Hugh S. Lee and plaintiff Anna M. Lee, (Addl. Abst. Vol. II of Exhibits).

(d) Planograph copy of page 35C of Plaintiffs' Exhibit 5B showing notary's certificate of acknowledgment of plaintiff Louise G. Anderson, (Addl. Abst. Vol. II of Exhibits).

(e) Planograph copy of page 67C of Plaintiffs' Exhibit 5B showing notary's certificate of acknowledgment of defendant Jacob Katz and his wife, (Addl. Abst. Vol. II of Exhibits).

(f) Planograph copy of page 14 of Plaintiffs' Exhibit 5A showing certificate of acknowledgment of Walter J. Harrower, (Addl. Abst. Vol. II of Exhibits).

[fol. 391] (g) Planograph copy of page 15C of Plaintiffs' Exhibit 5B showing notary's certificate of acknowledgment of Patrick T. Burke (Addl. Abst. Vol. II of Exhibits).

(h) Also planograph copies of two (2) pages of Plaintiffs' Exhibit 5C showing list of property by parcel number, legal description, street and street number of properties included in said Restrictive Agreement on Rhodes Avenue, including 6140 Rhodes Avenue and on East 60th Street, including 413 East 60th Street, (Addl. Abst. Vol. II of Exhibits).

MAN SCHROEDER, called as a witness on behalf of the ants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dickerson:

Will you state your name and address, please?
Herman Schroeder, 3015 North Avers Avenue.

Shannon: In order to expedite matters as far as pos- so there won't be a constant run of objections here ore than is necessary, I want to make a general ob- such as the other side did in reference to our testi- that is, if it is agreeable to the Court and to counsel e a general objection, and have it carried through t my having to repeat it each time—in this behalf: t as to the defendants Israel Katz, Carl A. Hansberry, e L. Hansberry, Jay B. Crook, Hallie C. Crook, James n Burke and Harry H. Pace, each of whom are shown record to have either signed the restrictive agreement uced in evidence as Plaintiffs' Exhibit 5, 5-A, B and 92] C, or are persons in privity of estate as grantees, direct or remote, of persons who had signed the agree- we object to them or any witnesses for them or any entary evidence which seeks to attack the validity of greement, as being estopped by reason of being the es, and in privity of estate.

n as to all of the defendants, we object to any testi- by them or on their behalf which in any way seeks ck or deny the execution, the delivery, the existence, mpliance with the conditions precedent, the enforci- of the restrictive agreement admitted in evidence as iffs' Exhibits 5 and 5-A, B and C, because of the el by verdict against each and all of the defendants ttacking the validity, the delivery, the execution, the ce and enforcibility of that agreement, by reason of dicata through the judgment and the decree of the or Court of Cook County, Illinois, entered in the case rke v. Kleiman, et al., General Number 567687, en- on October 2, 1933, being a class suit, which decree as affirmed by the Appellate Court on November 27, n the Appellate Court for the First District, case r 37522, entitled there Burke v. Kleiman, et al.

, my understanding is that it is not necessary to

move to strike under the New Practice Act, but I want to have a general motion to strike any evidence that tends in any way to have the effect of attacking this agreement, as if I moved in each instance to strike it, if that may stand, too, so that we can speed the matter up if possible.

The Court: I think that is very satisfactory.

[fol. 393] The Witness: I am employed by the City of Chicago as a draftsman in the City Map Department. We have copies of the subdivisions in the City of Chicago.

Q. You have the maps and plats in the City of Chicago?
A. Yes, sir, copies.

Witness is asked if he has the plat showing the lots and their dimensions by feet and inches in the area commonly known as the Washington Park Subdivision, and more particularly described with reference to street numbers on one or the other side of Evans, Langley, Champlain, St. Lawrence, Rhodes, Eberhart, Vernon and South Park Avenues, between 60th and 63rd Street and on 60th, 61st and 62nd Streets between South Park and Cottage Grove Avenue in the City of Chicago.

Mr. Churan: I object to that, in addition to the objection Mr. Shannon made, because the witness said that these were copies, and the question includes the measurements. That is a very important and material question. These are copies of originals. There are originals. The originals must be somewhere else.

The Witness: These subdivisions there are kept by the examiner of subdivisions and are recorded, and in late years there has always been a copy left in our office and then put on the books.

Mr. Churan: It is twice removed from the original record, according to the witness, * * * a copy of copies.

Q. And this document is made by a draftsman from the recorded plat, the original recorded plat in the office of the Recorder of Deeds?

[fol. 394] The Witness: A. Well, no. Our office don't make it from the original plat, because the owner retains original plat. The original plat is recorded and this is made from the recorded plat.

Q. And you have that plat in your files?
A. I can't state whether we have it, which ones are on

e in our office and * * * I don't know whether they e there or not.

Q. Now this particular map that you have in your hand, w long have you had it in your files?

Mr. Churan objects: That does not make it a competent cument.

The Court: You have no personal knowledge as to ether or not this copy is an accurate reproduction or py?

The Witness: I haven't checked it personally, that is why can't say. I assume it is an actual copy.

The Court: Let this gentleman testify on these matters u seek to prove, subject to their objection.

The Witness: This is a part here between 60th and 61st reet and Cottage Grove and South Park which is ante-e.

Cross-examination.

By Mr. Shannon:

Q. Do you know whether they show the st*i*uation and con-tion as it existed in 1928?

A. Just by records here.

Q. In other words, what you find on there, that is the ly thing you know about it?

A. That is all.

Q. And part of that runs back to ante-fire time * * * d other parts to various other times?

A. Yes.

ol. 395] Q. So that the map doesn't fix the status as of y given date?

A. No, sir, these are posted up to date as subdivisions e recorded? *A.* I did not make these tracings from which ese exhibits for identification were taken, nor the blue ints. I had nothing to do with the matter except to have em handed to me before I came up here and that is all know about them.

Mr. Churan: Well, we make a specific objection as to that, at is not an original record and not the best record of ose measurements.

WALLACE A. ANTHON, for defendants, testified as follows:

Direct examination:

I am map engineering draftsman for City of Chicago. I supervise the general work. These tracings were made from a compilation of recorded subdivision plats. These particular ones were not made under my supervision, this blue print was.

I know these blue prints are exact reproductions of the tracings. (Documents offered in evidence.)

Cross-examination.

By Mr. Shannon:

Q. Mr. witness, you say these are correct reproduction- of the recorded plats. You mean, don't you, that they are a correct reproduction of the drawings and tracings in the City Map Department's office as they were taken in part from the recorded plats and in part from other sources of information?

A. That is correct.

[fol. 396] Q. So that it isn't a fact that they are the exact reproduction of the recorded plats, but they are an exact reproduction of the City Map Department's tracings and plats?

A. Yes, which are taken from the recorded plat.

Q. In part?

A. Yes.

Q. So that these Exhibits 1, 2, 3 and 4 are all taken from compilations of subdivisions and parts of them, are they not?

A. These Exhibits, 1, 2, 3 and 4 are taken from a tracing or a series of tracings which are taken or made from a compilation of subdivisions as recorded.

Redirect examination.

By Mr. Dickerson:

They are checked against the best available records we can find in the Department. Those records are in the Recorder's Office, we have copies in our office—some of them.

Defendants' Exhibits, 1, 2, 3 and 4 offered in evidence.

Mr. Churan: In addition to the general objection, I make the further objection that it is not the best evidence.

The Court: They may go in subject to the objection.

(Witness shown "Defendants' Exhibit 5" for identification.)

This is a print of the particular area, it covers Defendants' Exhibits, 1, 2, 3 and 4 in part.

Q. Have you examined this document with reference to Defendants' Exhibits 1, 2, 3 and 4 as to its being a correct or true copy of those documents?

[fol. 396a] A. Well, I would have to answer that question this way, you see, these dimensions aren't readable, aren't legible. It is a very poor reproduction and the chances are you can't make out only in a small percentage of them, what the figures are. I have not checked the dimensions of the lots.

I supervised the preparation by feet in the area set out in Defendants' Exhibits 1, 2, 3 and 4. I did not do it personally. I had two (2) men do it. (Objected to by Mr. Churan as hearsay.)

The Court: Yes, I think the men that did it should be produced. Let him testify as he has the computation with their promise to connect it up.

Defendants' Exhibit 6 for identification is a compilation of all the frontages on the streets in question.

Defendants' Exhibit 6 offered in evidence. Objected to by Churan.

Mr. Dickerson: I am now offering it in evidence subject to it being connected up. I suppose——

(Exhibit 6 offered and received in evidence.)

Mr. Churan: I understand it is admitted subject to our objection.

The Court: Yes.

Cross-examination:

I included in the frontage the Sexton School property.

Q. And did you include in your computation the Trinity Church property?

A. Our records don't show buildings.

[fol. 396b] Q. Or the synagogue?

A. We don't show churches.

Q. Or the Swedish Methodist Church?

Mr. Dickerson: I object to this line of cross examination. Whether it is a church or synagogue or a school is beside the point here. His own document which they are relying on makes no distinction as to church, synagogue, doghouse, or anything else. It merely describes areas within definite street lines, and therefore whether it is a church, or a doghouse or a garrison or anything else would have nothing to do with it. As a matter of fact, some of the signators to the alleged covenant are so-called churches.

Mr. Churan: So-called churches?

Mr. Dickerson: Yes, we will put that in, so-called churches.

Mr. Churan: We object specifically and ask that this evidence be excluded.

Mr. Shannon: On the form of the proofs, not properly proved up.

The Court: It may stand.

Objection made by plaintiffs to the evidence and computations as to frontage by witness Joseph Dvorak, as follows:

Mr. Shannon: I take it the same objections as to form of proof that I made before will stand as to the witness' testimony and the motions to strike will carry through both as to form of proof and to its substance.

The Court: Yes.

[fol. 397] Truman K. Gibson, Jr., recalled on behalf of the defendants, testified as follows:

Direct examination:

I have seen Plaintiffs' Exhibits Nos. 5, 5A, 5B and 5C before. I saw them since the beginning of the trial and also copies in the office of the Recorder of Deeds; I examined them in the office of the Recorder of Deeds as Documents No. 9917411-2-3-4; during the examination, I made notes in the office of the Recorder of Deeds and a list of the purported signatures appearing attached to 9917411 and also made a list of the purported notarized signatures in documents—12-13-14.

Then I prepared a map of the purported restricted area covered by Plaintiffs' Exhibit No. 5 and on each lot in the purported restricted area I examined the record title holder in the tract books in the office of the Recorder of Deeds and entered the name of the owner of each lot on these maps that I had prepared. This is a series of maps showing the lots in each block in the purported restricted area covered by Plaintiffs' Exhibit No. 5, together with the names of the owners of record title as of the 1st day of February, 1928.

I prepared Defendants' Exhibit No. 12 for identification; after I prepared this map showing the name of the record title holder in the purported restricted area as of the 1st of February, 1928, I checked the record title holder with the names of the purported signators to Plaintiffs' Exhibits No. 5, 5A, 5B, and 5C to ascertain what of the record title holders as of the 1st of February, 1928, had purportedly signed Plaintiffs' Exhibit No. 5.

[fol. 398] Mr. Churan: This all goes in subject to Mr. Shannon's objection made this morning, if the Court please?

The Court: All right.

The Witness: These shaded black areas indicate lots for which there were purported signatures but for which either persons other than the record title holders signed or persons in addition to the alleged signators appearing in the tract books in the offices of the Recorder of Deeds.

Mr. Churan: Right there did you get that from the tract book or from the record of the deed?

The Witness: From the tract book.

The area described in Defendants' Exhibit No. 12 for identification is identical with the area described in Plaintiffs' Exhibit No. 5.

Q. Were there any changes in ownership of the property based upon your examination of the tract records between February 1st, 1928 and September 30th, 1927?

A. There were none; that is, I should like to qualify that last answer. There were no changes on these so-called doubtful or shaded areas. Those are the only areas that I checked as of the 30th of September, 1927. Where the purported signature was the same as the record title holder, I did not check that.

Mr. Churan: That is on the tract book you refer to?

The Witness: Yes.

Mr. Dickerson:

Q. And, Mr. Witness, you made a computation of the areas described in Defendants' Exhibit No. 12 which was marked by you in blue?

The Witness:

A. I have.

[fol. 399] The witness is then asked as to his computation of the areas or lots by frontage in feet described in the map and is also asked to compute the percentages from the computation, also as to areas, for which witness says no purported signatures appeared attached in Plaintiffs' Exhibit No. 5.

Q. And those areas in red are part of the description set forth in Plaintiffs' Exhibit No. 5, are they not?

A. They are.

Mr. Churan objects to the question and answer.

The Court: Well, it has been answered, so let it stand.

Mr. Dickerson: I now offer in evidence Defendants' Exhibit No. 12 for identification.

Mr. Churan: I object to it, if your Honor please, for the reasons stated in our general objection and specifically object because all his information was obtained from the tract book. Now, the tract book is not a record. The only way to prove ownership, if your Honor please, is by deeds.

The Court: He says the record title shows a discrepancy; now, the tract book is the place to get the record title, isn't it?

Mr. Churan: No. That is simply a memorandum for the public to get at the owners or the chain of title, but the tract books are not complete. They don't always give you all of the grantors or all of the grantees. They simply use one name without giving the rest and in order to make sure, you have to go to the record of the documents and read the deeds. Your Honor knows that in the country you don't have any tract books.

The Court: No.

[fol. 400] Mr. Churan: They simply have the record of original deeds and you have to go and find the original documents and look up your records and show your chain of title that way. But here, for the convenience of the

public, the Recorder has prepared what are known as tract books and those are simply memoranda. He don't guarantee that those are correct and that is where this witness has gotten his information from. It isn't the best evidence.

The Court: There must be something wrong about this. Now, here's a piece and they sign, say, for this two lots and they represent themselves in this document to be the owners of those two lots. Now, you have got something whereby you are seeking to impeach that ownership. It has to be the best record. Now, down-state we don't have these tract records. We have the abstract and we will go and examine the deed. We will examine the record title and it will take that to impeach at least the show that has been made here by the plaintiff that they, whoever signed this purported agreement, were the owners of the title that they represented themselves to own.

The Court: My point is this. There must be something lacking in these tract records to bring about such a tremendous discrepancy.

(Discussion off the record.)

The Court: Well, let it go in for what it is worth. It is taken from a record that ought to be authentic in so far as it goes. Now, it may not be conclusive, but if they want to rule upon that as to whether or not they can impeach the title of the person by such a record, then that's a matter that they can argue.

[fol. 401] The Court: Well, I will let it go for what it is worth and as to just exactly what value you can attach to it, why it will probably be a matter that you have to argue.

Mr. Churan: Subject to our objection as not being the best evidence.

The Court: Subject to the objection, yes.

Truman K. Gibson, Jr., recalled on behalf of the defendants:

Direct examination.

By Mr. Dickerson:

Since I last testified, I have made an effort to find the original documents referred to in my testimony of sev-

eral days ago and I did not obtain them. They were not available to me. I obtained certified copies of those documents.

Mr. Churan: If the Court please, the statute provides a certain way in which documents, certified copies or deeds are introducible in evidence and there is only one way and that is to make an affidavit that the instruments are beyond their control under Sections 35 and 36 of the statute.

The Court: Well, did he say he could not locate them and they are beyond his control?

Mr. Churan: I simply want to make an objection, if the Court please, to the competency of the evidence.

Mr. Dickerson: I offer these in evidence as Defendants' Collective Exhibit No. 19, consisting of forty-three separate certified copies of documents.

Mr. Churan: We object to these documents, if the Court please, under our general objection made by Mr. Shannon [fol. 402] at the beginning of the defense and also specifically because they are incompetent, irrelevant and immaterial.

The Court: They may go in.

Mr. Dickerson offers in evidence complaint in suit filed in Superior Court of Cook County, Illinois, entitled Louise G. Anderson, et al. v. Paul A. Hansberry, et al., No. 37S-7357, and also the summons showing the parties Plaintiff and the parties Defendant.

Mr. Churan: We object to this evidence as absolutely immaterial and irrelevant and not between the same parties and an entirely different cause of action. The exhibits offered are in a civil suit for damages while this case is——

The Court: Let it go in.

And thereupon Defendants' Exhibits Nos. 20 and 21, Exhibit No. 20 being the complaint, and No. 21 being the summons, were received in evidence over Plaintiffs' objections.

Defendants offer in evidence certified copy of exceptions taken by the complainant to the answer of Isaac Kleiman, certified copy of exceptions to the answer of James L. Hall and certified copy of exceptions taken by complainant to the answer of Sam Kleiman, all signed by H. E. Raymond as solicitor for complainant in the case of Burke v. Kleiman, et al., Superior Court, and also certified copy of order entered by the late Honorable Robert E. Gentzel, Judge of

the Superior Court of Cook County, overruling the exceptions to said answers.

Mr. Churan: No objection.

(Document so offered, received in evidence as Defendants' Exhibit No. 23.)

[fol. 403] Joseph K. Sheedy, called as a witness on behalf of the Plaintiffs in rebuttal, having been previously duly sworn, testified as follows:

Direct examination:

I am the same Joseph K. Sheedy that testified in this case before.

Q. Calling your attention to page 19 of Plaintiffs' Exhibit 5, the signatures of Helen Katz and Israel Katz.

A. I saw him when he signed this. I took the acknowledgment.

Q. Did he make any objections to signing?

A. No, he didn't after Nathan talked to him, he said he would sign, but he wouldn't pay. He said he would sign if he wouldn't have to pay dues.

Q. What did you say to that?

A. Why, I let him sign. His wife signed also. I acknowledged that signature also.

Charles A. Churan, called as a witness on behalf of the Plaintiffs in rebuttal, having been first duly sworn, testified in narrative form as follows:

Direct examination:

My name is Charles A. Churan. I am an attorney for the plaintiffs in this case and have been the attorney for the Woodlawn Property Owners for five years last past and their secretary for two years, from 1933 to 1935.

I have resided in Washington Park Subdivision for the last 20 years continuously and am familiar with the situa-[fol. 404] tion in regard to the occupancy of colored in the Washington Park Subdivision during that time.

Since the case of Burke v. Kleiman was decided by the

Appellate Court in November, 1934, there have been but four violations of our restrictive agreement, Plaintiffs' Exhibits 5-A, 5-B and 5-C. The first violation that occurred after the decision of the Burke v. Kleiman case was the property on the west side of South Park Avenue, between 60th and 61st. That was known as the Yondorf property, a court building. We filed a case against that building in January, 1934, in the Superior Court of Cook County, case entitled, George W. Cook and others v. Milton S. Yondorf, individually and as Trustee, etc., Case No. 34S-1261. We were in the trial of that case in court and before Master in Chancery for about a year and a half, a year more than that. The decree was entered in that case on October 20, 1936.

During the progress of that case, it developed that that property had been forclosed on a mortgage or trust deed, which was on that property prior to the restrictive agreement, so the decree entered in that case covers that situation and we offer the decree in that case in evidence as Plaintiff's Exhibit No. 31.

(Objected to by Mr. Dickerson.)

The Court: It may stand.

(Said document so offered and received in evidence as Plaintiffs' Exhibit 31.)

[fol. 405] EXHIBIT 31

Decree entered by Judge Allegretti in the Superior Court of Cook County on October 20, 1936:

No. 34S 1261

GEORGE W. COOK, et al.,

vs.

MILTON S. YONDORF, Individually and as Trustee, et al.

Decree

This day come the plaintiffs George W. Cook (and other plaintiffs) by Charles A. Churan and Schuyler, Weinfeld and Hennessy, their attorneys, and the defendants Milton S. Yondorf, individually and as Trustee, S. Yondorf & Co., Inc., a corporation, Sid Werner, Gertie Oppenheimer, Noah

Van Cleef, Gertrude Rashman, Milton Brunhild, Julius Marx, Samuel J. Ascher, as Trustee of the Albert Ascher Trust, Mrs. George Friend, Maude Bauer, Christian Bauer, M. Philip Ginzburg, Stella Strausz, Paul J. Ramm, Julia Siller, Mrs. H. Gutman, Rebecca Freeman, Frank H. Glasgens, Emma Vanderleest, Leslie F. Stave, Thomas Caulfield, Charles R. Stave, Louis F. Nafis, Anna A. Fuelling, Amelia Roth, Morris Isenberg, William Kaufman, Amelia R. Smith, W. L. Hempleman, S. R. Hempleman, Jacob A. Goodman, Mary Weintraub, Joseph M. Schaefer, Mabel A. Cooke, Helen Walton, Edith Rosenfield, Mabel F. Nafis and Hilda A. Hobbs, by Decker, Golden and Perlman, their attorneys.

1. And it appears to the Court that the defendants Michael J. Bartley and Cecelia J. Bartley, his wife, were duly served with summons, but have failed to file their ap- [fol. 406] pearance or Answer to the plaintiffs' complaint, It is Ordered that a default be and the same is hereby entered forthwith against said defendants Michael J. Bartley and Cecelia J. Bartley, his wife, for failure to plead or answer.

2. And this cause coming on now to be heard upon the complaint heretofore taken as confessed by and against the defendants Michael J. Bartley and Cecelia J. Bartley, his wife, and upon the Answer of the defendants Milton S. Yondorf, individually and as trustee, and other defendants hereinbefore named answering by Decker, Golden and Perlman, their attorneys, and upon the report filed herein of Sidney S. Pollack, Esq., the Master in Chancery to whom this cause was by order of this Court heretofore referred to take proofs herein and report the same to this court with his conclusions on the law and the evidence.

3. And the Court having heard the arguments of counsel, finds that it has jurisdiction of the parties and subject matter of this cause, the Court finds that the Master has in all respects complied with the order of reference; it is therefore

Ordered that the Report of said Master be and the same is hereby approved.

4. And the court being now fully advised in the premises, finds that on the 20th day of November, A. D. 1924, one Mary L. Stickle, a spinster, executed and delivered to the

defendant, Milton S. Yondorf, as trustee, a Trust Deed of that date, conveying to said Yondorf as trustee, the following described real estate, to wit:

Lots One (1), Two (2), Three (3) and Four (4) in the Subdivision of the East Two-thirds (E⅔) of the South [fol. 407] half (S½) of Lot Three (3) in Wilson, Heald and Stebbings' Subdivision of the East half (E½) of the South West Quarter (SW¼) of Section Fifteen (15), Township Thirty-eight (38), North, Range Fourteen (14), (sometimes known as court partition) East of the Third (3rd) Principal Meridian in Cook County, Illinois, commonly known as 6024 to 6030 South Park Avenue, Chicago, Illinois,

to secure an indebtedness of Seventy-five Thousand Dollars ($75,000.00), evidenced by notes of said Mary L. Stickle; that said Trust Deed was acknowledged by said Mary L. Stickle, and was thereupon on the 20th day of November, 1924, filed for record in the Recorder's Office of said County and recorded as Document No. 8678714.

5. That on, to-wit: the 20th day of December, A. D. 1926, the said Mary L. Stickle conveyed said premises to the defendants Michael J. Bartley and Cecelia J. Bartley, his wife.

6. That on, to-wit: the 30th day of September, A. D. 1927, the said defendant Michael J. Bartley and Cecelia J. Bartley, while owners of said premises entered into a certain written restriction agreement with over five hundred (500) other owners of real estate situated on one or the other sides of Evans, Langley, Champlain, St. Lawrence, Rhodes, Eberhart, Vernon and South Park Avenues, between 60th Street and 63rd Street, and on 60th, 61st and 62nd Streets between South Park Avenue and Cottage Grove Avenue in the City of Chicago, County and State aforesaid, wherein and whereby, for the best interests of all the parties thereto, and the property therein described, in consideration of the premises and of the mutual covena-ts therein contained, [fol. 408] covenanted and agreed with each other that their respective parcels of land should then and until January 1, 1948, be subject to the restrictions and provisions hereinafter set forth, and that they, said Michael J. Bartley and Cecelia J. Bartley, his wife, would make no sale, con-

tract of sale, conveyance, lease or agreement, and give no license or permission in violation of such restrictions or provisions therein contained.

7. That the restrictions referred to in said restrictive agreement are as follows, to-wit:

"The restriction that no part of said premises shall in any manner be used or occupied directly or indirectly by any negro, or negroes, provided that this restriction shall not prevent the occupation, during the period of their employment, of janitors' or chauffeurs' quarters in the basement or in a barn or garage in the rear, of servants' quarters by negro janitors, chauffeurs, or house servants respectively, actually employed as such for services in and about the premises by the rightful owner or occupant of said premises.

The restriction that no part of said premises shall be sold, given, conveyed or leased to any negro or negroes, and no permission or license to use or occupy any part thereof shall be given to any negro except house servants or janitors or chauffeurs employed thereon, as aforesaid."

8. That said restriction agreement further provided that the covenants, restrictions and agreements therein contained should be binding upon and for the benefit of each [fol. 409] party thereto, and might be enforced by any of the parties thereto by any permissible legal or equitable proceedings, including proceedings to enjoin violation and for specific performance; that said agreements and the restrictions therein contained should be of no force or effect unless said agreement or a substantially similar agreement, should be signed by the owners therein enumerated of ninety-five per centum of the frontage above described, or their heirs or assigns and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31, 1928.

9. That ninety-five per centum of the frontage on said above named streets (not meaning to include Cottage Grove Avenue or 63rd Street in the required frontage) was signed up by the owners of the property enumerated in said restriction agreement on or before December 31, 1928, to-wit: on February 1, 1928, and that said restriction agreement was filed for record in the office of the Recorder of Deeds of Cook County on February 1, A. D. 1928, and recorded in

Book 25525, of Records, beginning with Page 5, to and including Page 117, as Documents Nos. 9914711, 9914712, 9914713, 9914714, and 9914715.

10. That it is further provided in said restriction agreement that the covenants, restrictions and agreements therein contained shall be binding on and for the benefit of and may be enforced by and against each party thereto, his successors and assigns; that said agreement is now, and has been continuously in effect since said agreement went into full effect by recordation thereof on said February 1, 1928.

[fol. 410] 11. That on November 20, 1929, said Michael J. Bartley and Cecelia J. Bartley, his wife, while still the owners of said real estate, entered into and executed an agreement with S. Yondorf and Co. Inc., as agent of the legal holders of said above described Trust Deed and the indebtedness secured thereby, whereby the payment of said indebtedness was extended.

12. That the said Michael J. Bartley and Cecelia J. Bartley, defaulted in the payments stipulated in said extension agreement, and that by reason of such default, the defendant Milton S. Yondorf, individually and as trustee, filed in the Circuit Court of said County, his bill to foreclose said Trust Deed on June 26, 1931, said cause being No. B-222526; that on the 14th day of December, 1931, a decree of foreclosure was entered in said cause, and a Master's Sale of said premises was had under said decree on January 11, 1932; that defendant Milton S. Yondorf, as Trustee, became the purchaser at said sale; that on the 15th day of April, 1933, a Master's Deed issued to said Milton S. Yondorf as trustee, which said Master's Deed was recorded on April 19, 1933, as Doc. No. 11224727.

13. The Court further finds that the plaintiffs First National Bank of Englewood, George W. Cook, Olive Ida Burke, Mae F. Churan and Louise Kohn, are the owners of the premises alleged in the Complaint to be owned by them respectively, and that all of their said premises are improved with valuable residence or apartment properties, and situated within the territory included in said restrictive agreement.

[fol. 411] 14. That on or about the 1st day of February, 1934, the defendant Milton S. Yondorf, as trustee, then still

being the owner of said premises first hereinbefore described, leased various apartments of said premises to negroes, and has permitted negroes to occupy said premises as tenants ever since.

15. The Court further finds that the plaintiffs allege and contend that said Milton S. Yondorf, as trustee, is bound by the terms of said restrictive agreement executed by said Michael J. Bartley and Cecelia J. Bartley, while they were such owners of said premises, and that said Milton S. Yondorf, individually and as trustee, is violating said restrictive agreement in permitting said premises or any part thereof to be occupied by negroes as tenants; that said Milton S. Yondorf, individually and as Trustee, on the other hand contends that as the purchaser at the judicial sale under said foreclosure, said Trust Deed under which said foreclosure sale was had, having been executed and recorded and having become a mortgage lien on said premises prior to the execution by said Bartleys of said restrictive agreement, and prior to December 31, 1928, that said premises are not subject to said restrictive agreement; that he is not an assign or successor in title as contemplated by said agreement.

16. The Court finds that said restrictive agreement was at the time of the filing of the complaint in this cause, and is now in full force and effect, and a valid agreement between the parties and their successors or assigns, but further finds that the defendant Milton S. Yondorf as trustee [fol. 412] having acquired title by foreclosure of a Trust Deed which had become and was a prior lien on said premises, and prior to the going into effect of said restrictive agreement, is not bound thereby, and that said Milton S. Yondorf as Trustee acquired title to said premises under said foreclosure free and clear of the restrictions and provisions of said restrictive agreement, and said restrictive agreement is not binding on Milton S. Yondorf as trustee, or anyone claiming by, through or under him.

The Witness (continuing): The next violation of the agreement occurred in the case of the property at 549 E. 60th Street, property in which the Defendant Carl A. Hansberry, in October, 1936, which went to the Appellate Court in the case which has been referred to here as Plath v. De Launty involving the lease, wherein Ruth Hoffman, a white

woman, obtained a lease from the Receiver in the case and order was entered as shown by the copy that has been offered in evidence as the order and the affirmance thereof of the Appellate Court. The Appellate Court affirmed the Circuit Court in April, 1937.

Next violation that we had in the district was the property known as 413 E. 60th Street on 60th between South Park Avenue and Vernon Avenue. That is the property now occupied by Harry H. Pace, one of the defendants in this case. He moved into that property on the 29th day of April, 1937 and we had a case pending against him in the Superior Court involving that property, which is still pending.

The last violation was the case involving this property at 6140 Rhodes Avenue, wherein the defendant Carl A. [fol. 413] Hansberry, and his family moved into that property on the 26th day of May, 1937 and action was commenced against that property on the 7th day of June, 1937, which is the case on trial here.

While the case of Burke v. Kleiman was in the Appellate Court, the east side of South Park Avenue, north of the building which is on the corner, the Apartment building, on the southeast corner of South Park and 60th Street, which is described in the Burke v. Kleiman case. One property was turned over to the colored and then four or five others on that side of the street. There are only seven apartment buildings on the east side of South Park Avenue, between 60th and 61st Street.

Before the decision in the Burke v. Kleiman case in November, 1934, I was instructed to commence actions against those properties on the east side of South Park Avenue. Case was commenced against property at 6029-31 South Park Avenue, owned by white ownership. A man by the name of Louis Ellis, case entitled, Olive Ida Burke v. Lizzie Ellis, et al., and the colored tenants at that property which is pending in the Superior Court of Cook County, case No. 588812, and consolidated with the case which I commenced against the property at 6033, 6035 South Park Avenue and property 6037, and 6039 South Park Avenue, which case is pending in the Superior Court, owned by white owners, but occupied by colored tenants. That case is on trial calendar to go to trial, just as soon as we get through with this case.

I filed another action against one of the other properties

on the east side of South Park Avenue, property owned by [fol. 414] Sarah Cohn, a white person at 6049 and 6051 South Park Avenue, which is the most southerly property on the east side of South Park Avenue, between 60th and 61st Streets, a six apartment building occupied by colored tenants. That case was commenced in the Superior Court of Cook County on the 23rd day of October. Service was had and appearances in that case by attorneys for Sarah Cohn and the Defendants, and that case was referred to a Master and went to a decree. Decree entered on May 5, 1936, and I offer that decree in evidence as Plaintiffs' Exhibit 32.

(Decree in Penoyer v. Cohn, Superior Court 34 S. 16816, received in evidence, marked Plaintiffs' Exhibit 32.)

EXHIBIT 32

Decree entered May 5, 1936, before Judge Harry B. Miller, Judge of the Superior Court of Cook County, in the case of Howard S. Penoyer, et al. v. Sarah Cohn, et al., No. 34S 16816, is as follows:

No. 34S 16816

Howard C. Penoyer, et al., vs. Sarah Cohn, et al.

Decree

This day come the plaintiffs Howard C. Penoyer, Greta L. Penoyer, his wife, Fannie L. Schmelzer, John Schmelzer, her husband, Anton Lenczewski, and Woodlawn Property Owners' Association, a corporation, by Charles A. Churan, their attorney.

And it appearing to the court that the defendants Lovina [fol. 415] Harrison, J. W. Brown, John Cobb, W. M. Frazier, Gladys Jackson, Opal Timmons, Alfred B. Washington and Arcona Gordon, have been personally served with summons more than twenty days prior to the first Monday of February, A. D. 1935, and that said defendants and neither of them have filed their appearance or answer in this cause; it is

Ordered that a default be and the same is hereby entered against each and all of said named defendants for failure to appear or answer forthwith.

And it further appearing to the court that the defendants Unknown Owners have had due notice according to law by publication to file their answer or otherwise make their appearance in this cause on or before the third Monday in the Month of December, A. D., 1934, being the 17th day of December, A. D. 1934, and that said defendants Unknown Owners have failed to file their answer or otherwise make appearance herein up to this date, it is

Ordered that a default be and the same is hereby entered against said defendants Unknown Owners for failure to appear or answer forthwith.

And it further appearing to this court that the said defendants Sarah Cohn and Arthur W. Draper, Trustee, have filed their appearance herein by McGilvray, Eames, Vaughan and Tilley, their attorneys, but have failed to file their answer herein, therefore, upon due notice to said McGilvray, Eames, Vaughan and Tilley, it is heretofore

Ordered that a default be and the same was entered against said defendants Sarah Cohn and Arthur W. Draper, Trustee, forthwith, for failure to answer the plaintiffs' Complaint herein.

[fol. 416] And it is therefore ordered that said Complaint be taken as confessed against all of the defendants in this cause.

And this cause coming on now to be heard upon said plaintiffs' Complaint taken as confessed against all of the defendants herein, and upon the report of Sidney S. Pollack, Esq., Master in Chancery, to whom this cause was heretofore referred to hear the evidence and report his conclusions of law and fact thereon, the Court finds that said Master has in all respects complied with the order of reference; that no objections have been filed to said report; it is

Therefore ordered that the report of said Master in Chancery this day filed be and the same is hereby approved.

And the Court being now fully advised in the premises, finds that it has jurisdiction of the parties and of the subject matter of this cause; that on towit: the 30th day of September, A. D. 1927, more than five hundred (500) white property owners duly executed and entered into a Restrictive agreement described in the Complaint herein, said white property owners constituting and comprising more than ninety-five (95%) per cent of the then owners of property frontage on the one or the other side of Evans,

Langley, Champlain, St. Lawrence, Rhodes, Eberhart, Vernon and South Park Avenues, between the north side of Sixtieth Street and the alley south of Sixty-third and on Sixtieth, Sixty-first and Sixty-second Streets between South Park and Cottage Grove Avenues in the City of Chicago, in said County and State, said Restrictive Agreement being in words and figures, except as to signatures and certifi- [fol. 417] cates of acknowledgment, as follows:

This Agreement entered into this 30th day of September, 1927, by and between the undersigned owners of land on the one or the other side of Evans, Langley, Champlain, St. Lawrence, Rhodes, Eberhart, Vernon and South Park Avenue between 60th and 63rd Streets and on 60th, 61st, and 62nd Streets between South Park Avenue and Cottage Grove Avenue, in the City of Chicago, Witnesseth, that

Whereas, the following named persons own the respective parcels of land in said area set ammediately under their names, having the frontage hereinafter set forth;

And, Whereas, the parties hereto feel that the restrictions and covenants hereinafter imposed and created are for the best interests of all the parties hereto and of the property hereinafter described.

In Consideration of the premises and of the mutual covenants hereinafter made, and of the sum of Five Dollars ($5.00) in hand paid to each of the parties hereto by each of the other parties hereto, the receipt of which is hereby acknowledged, each party as owner of the parcel of land above described immediately under his name, does hereby covenant and agree with each and every other of the parties hereto that his said parcel of land is now and until January 1, 1948, and thereafter until this agreement shall be abrogated as hereinafter provided, shall be subject to the restrictions and provisions hereinafter set forth, and that he will make no sale, contract of sale, conveyance, lease of agreement, and give no license or permission in violation [fol. 418] of such restriction or provisions, which are as follows:

1. The restriction that no part of said premises shall in any manner be used or occupied directly or indirectly by any negro or negroes, provided that this restriction shall not prevent the occupation during the period of their employment, of janitors' or chauffeurs' quarters in the base-

ment, or in a barn or garage in the rear, or of servants' quarters by negro janitors, chauffeurs or house servants, respectively, actually employed as such for service in and about the premises by the rightful owner or occupant of said premises.

2. The restriction that no part of said premises shall be sold, given, conveyed or leased to any negro or negroes, and no permission or license to use or occupy any part thereof shall be given to any negro except house servants or janitors or chauffeurs employed thereon as aforesaid.

The covenants, restrictions, and agreements herein contained shall be considered as appurtenant to and running with the land, and shall be binding upon and for the benefit of each party hereto and may be enforced by any of the parties hereto by any permissible legal or equitable proceedings, including proceedings to enjoin violation and for specific performance, provided, however, that in any action brought to set aside any deed made in violation of any of the provisions of this agreement, it shall be a good defense thereto that prior to the institution of each suit, the title to the premises then in question had become vested in, and was then owned by a corporation or a white person, for value; and provided, further, that the lien of no mortgage or trust deed in the nature of a mortgage shall be im- [fol. 419] paired or invalidated by reason of the breach of any of the provisions of this agreement, whether any such breach shall have occurred prior or subsequent to the recording of any such mortgage or trust deed; and provided, further, that nothing contained in the foregoing provisos shall in any manner impair the right of any person or persons interested to enforce at all times and against all persons the restrictions in this agreement contained prohibiting the use or occupation of all or any part of said premises by a negro or negroes.

This agreement and the restrictions herein contained shall be of no force or effect unless this agreement or a substantially similar agreement, shall be signed by the owners above enumerated of ninety-five per centum of the frontage above described, or their heirs or assigns, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31st, 1928, Provided, however, that if the owner of any of said parcels or of any part thereof shall be under disability, as, for example, when the

title is held, without such power, by testamentary trustees or other fiduciaries, the frontage so owned shall be treated as though the owners thereof had power to sign, and had signed this agreement, for the purpose of determining whether this agreement becomes effective or not under the provisions of this paragraph.

It is understood that for convenience a number of counterpart of concurrent instruments have been prepared, of even date herewith, the text of each of which is substantially the same as that of this instrument, and that the execution of any one of such instruments shall have the same [fol. 420] effect as the execution of this instrument by the same person would have, and it is understood that parties to this agreement shall include not only those persons who shall sign this instrument but also all persons who shall sign any of said counterpart or concurrent instruments, and that this instrument and all of said counterpart or concurrent instruments shall constitute one agreement. It being contemplated that changes in ownership may occur between the date which this instrument bears and the date when it shall become effective, or that there may possibly be some mis-recital of ownership herein contained, it is further understood that the execution hereof by the person who shall be the owner of any of said parcels of land at the time of such execution shall have the same effect as though such person had been the owner thereof on the date hereof and was so described herein, whether the recital of ownership herein contained be made to conform to the facts at the time of execution or not. And if, in order to conform to the facts as to ownership at the time of execution, the recital of ownership in any of said instruments shall be made different from that contained in the others, that difference shall not prevent all of such instruments from being construed to be substantially similar to each other.

No restriction imposed hereby shall be abrogated or waived by any failure to enforce the provisions hereof no matter how many violations or breaches may occur.

This Agreement and the restrictions herein expressed may be abrogated at any time on or after January 1, 1948, by the written agreement of the owners of seventy-five per [fol. 421] centum of the frontage owned by the parties who shall sign this agreement, as herein set forth, such abroga-

tion to be effective from and after the date of delivery and recording of such written agreement. Provided, however, that if the owner of any of said parcels or any part thereof shall be under disability, as for example, that of minority, or for any other reason shall not have the power to execute such abrogation agreement, as for example, when title is held without such power, by testamentary trustee or other fiduciaries, the frontage so owned shall be treated as though the owners thereof had power to sign, and had signed, such abrogation agreement, for the purpose of determining whether such abrogation agreement becomes effective or not under the provisions of this paragraph.

The invalidity of any restriction hereby imposed, or of any provision hereof, or of any part of any such restriction or provision, shall not impair *of* affect in any manner the validity, enforceability, or effect of the rest of this agreement.

Pronouns herein employed in the masculine gender shall be construed to include the feminine and neuter genders, and the word "party" to include natural and artificial parties or persons.

The term "negro," as used herein shall include every person having one-eighth part or more of negro blood, or having any appreciable admixture of negro blood, and every person who is what is commonly known as a colored person.

In any case where there is a recorded lease of any parcel of the property described herein for a term ending more than five years after any given date the owner of the rever- [fol. 422] sion and the owner of the leasehold estate together shall be deemed to be the owners of such parcel or such given date within the meaning of this contract, and whenever the signature of the owner of such parcel shall be required on such given date under the provisions hereof, the signatures of both shall be required, provided that whatever interest any signer of this instrument owns in any of said property shall be bound by the provisions hereof. Leases under unrecorded leases on any given date and under leases for terms ending less than five years after such given date, shall not be regarded as owners within the meaning of this contract.

The undersigned spouses of owners of land herein described join herein for the purpose of signifying their assent hereto and of subjecting their rights of dower, if any, to the restrictions and provisions imposed hereby.

Time is of the essence of this Contract and all the terms, conditions and provisions hereof.

The covenants, restrictions and agreements herein contained shall be binding on, and for the benefit of and may be enforced by and against each party hereto, his successors and assigns, and the heirs, executors, administrators and successors of them respectively.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the year and day first aforesaid.

That said Restrictive Agreement was duly acknowledged by respective signers thereof, and filed for record in the Recorder's Office of Cook County on February 1, 1928, and [fol. 423] recorded in Book 25525 of Records, commencing at page 5 of said Book as Document No. 9914711, thereby complying in all respects to the conditions in said agreement contained with respect to the execution and recordation thereof.

That on towit: the 1st day of February, A. D. 1928, the defendant Sarah Cohn was and now is, the owner of the following described real estate, towit:

Lot One (1) in Murry Wolbach's Resubdivision of Lots twenty-four (24) to Twenty-eight (28), both inclusive, in Block One (1), in John J. Mitchell's South Park Subdivision of Blocks Nine (9), Ten (10) and Eleven (11), in Maher's Subdivision of the South East Quarter (SE¼) of Section Fifteen (15), Township Thirty-eight (38) North, Range Fourteen (14), East of the Third (3rd) Principal Meridian, in Cook County, Illinois, commonly known as 6049-6051 South Park Avenue, Chicago, Illinois.

That said real estate was and now is improved with a six-flat apartment building on the east side of South Park Avenue between Sixtieth and Sixty-first Streets, within the territory bounded by and included in the said Restrictive Agreement, said territory being also known and referred to as the Washington Park Subdivision, or Washington Park District.

That said Sarah Cohn was one of the signers of said Restrictive Agreement, and her signature thereto was duly acknowledged before recordation of said agreement.

That the plaintiffs, Howard C. Penoyer and Greta L. Penoyer, his wife, were at the time of the filing of the com- [fol. 424] plaint herein, and are now the owners of the following described real estate, towit:

Lot Forty-four (44) in Block One (1) in John J. Mitchell's South Park Subdivision aforesaid, commonly known as 6020 Vernon Avenue, Chicago, Cook County, Illinois.

That they acquired title thereto by deed from one Laura B. Stebbins, who was the owner of said premises on said February 1, 1928, and who was one of the signers of said Restrictive Agreement; that the last described real estate consists of a two-story and basement residence of the value at the time of the violation of said Restrictive Agreement of about Nine Thousand and no/100 ($9,000.00) Dollars; that same is located on the west side of Vernon Avenue between Sixtieth and Sixty-first Streets; that Vernon Avenue is one block east of said South Park Avenue; that a fourteen foot alley separates the rear of said Penoyer premises from the rear part of said Sarah Cohn property.

That the plaintiff, Fannie L. Schmelzer, formerly Fannie L. Searle, was when said agreement went into effect, and is now, the owner of the following described real estate, towit:

Lot Fifteen (15) in Block Two (2) in said John J. Mitchell's South Park Subdivision commonly known as No. 6029 Vernon Avenue, Chicago, Cook County, Illinois.

That this plaintiff's said real estate consists of a three-flat apartment building of the present value of about Ten Thousand ($10,000.00) Dollars, and is located on the east side of Vernon Avenue between Sixtieth and Sixty-first Streets in said Washington Park Subdivision, a little over [fol. 425] a city block away from the premises described and owned by said Sarah Cohn; that this plaintiff, then named Fannie L. Searle, also executed and acknowledged said Restrictive Agreement.

That the plaintiff Anton Lenczewski, also executed and acknowledged said Agreement before the recordation thereof; that he was then, and is now the owner of the following described real estate, towit:

Lots Forty (40) and Forty-one (41) in Block One (1) in said John J. Mitchell's Subdivision, etc., commonly known as No. 6028-6030 Vernon Avenue, Chicago, Cook County, Illinois.

That same is and was then improved with a six-flat apartment building of the present market value of Fifteen Thousand ($15,000.00) Dollars, and is located on the west side

of Vernon Avenue between Sixtieth and Sixty-first Streets in said Washington Park Subdivision; that the rear part of his real estate is separated from the property of said Sarah Cohn by said alley common to both of said properties.

That all of said plaintiffs have strictly adhered to the terms and conditions of said Restrictive Agreement, and their said properties ever since said Restrictive Agreement went into effect has been and are now occupied solely by white or Caucasian persons.

The court further finds that said Agreement affects upwards of five hundred separate and distinct contiguous parcels of land, improved with valuable dwelling houses, apartment buildings, stores and commercial buildings, all located in a compact, closely built-up and extremely valuable section [fol. 426] of the City of Chicago and comprising twenty-seven city blocks.

That the property owners executing said agreement did so for the purpose of establishing a uniform restriction to safeguard the interests and values of said properties subject thereto, and that said agreement particularly recited that for the best interests of the parties thereto and of the properties therein described the said persons signing same mutually covenanted and agreed for valuable consideration to each other paid, among other things that no part of their said properties shall ever be used or occupied by or sold, leased or used, or given to any person of the negro race or blood, and that said covenant should run with the land, and be binding until January 1, 1948, or until said agreement should be abrogated as therein provided.

The Court further finds that all conditions provided for in and by said agreement for the purpose of determining whether or not said agreement became effective, were in fact fully performed and complied with, and that said agreement and the counterpart and concurrent agreements became and were effective, on towit: the first day of February, A. D. 1928 and have been in full force and effect from thence hitherto, and are now in full force and effect as a covenant running with the land and binding upon the plaintiffs and upon the defendant Sarah Cohn, and upon all of the persons who signed said agreement, their heirs, executors, administrators and assigns. That the plaintiffs are desirous of enforcing said restrictive agreement.

That the plaintiff Woodlawn Property Owners' Association is a corporation, not for pecuniary profit, only incor-

[fol. 427] porated under the laws of the State of Illinois, and organized among other things for the purpose of enforcing said Restrictive Agreement; that the membership of said Association is composed of signers of said Restrictive Agreement, or their successors in title, and the signers of other negro restriction agreements in that part of the City of Chicago known as Woodlawn; that said Association has now a membership of about 1200 white property owners located in said Washington Park Subdivision and said Woodlawn; that said Association has been active in seeing that said Restrictive Agreement is kept in force; that no violations of said Restrictive Agreement as to negro occupancy have been permitted in said Washington Park Subdivision or in Woodlawn, except on South Park Avenue between Sixtieth and Sixty-first Streets, where the said defendant Sarah Cohn and several other signers of said Restrictive Agreement on or about July 1, 1933, confederated together to violate said agreement; that other actions to restrain these violations and to compel the enforcement of said restrictive agreement against these violators on South Park Avenue between Sixtieth and Sixty-first Streets are now pending in this court; that no violations of said restrictive agreement exist in said territory bounded by said agreement south or east of said property owned by the defendant Sarah Cohn.

The Court further finds that said defendant Sarah Cohn, unlawfully and in violation of the covenants of said restriction agreement by her executed, did on or about July 1, 1933, and since over the objections of the plaintiffs, rent to and permitted her said six-flat apartment building here-[fol. 428] inbefore described and commonly known as 6049 and 6051 South Park Avenue, Chicago, Illinois, to be rented and leased to, used and occupied by negroes and persons who are commonly known as colored persons; that the defendants Lovina Harrison, J. W. Brown, John Cobb, Gladys Jackson, Opal Timmons and Arcona Gordon, all of whom are negroes, or persons commonly known as colored persons, were at the time of the filing of the Complaint herein, or since, tenants or occupants of said premises hereinbefore described as owned by the defendant Sarah Cohn, commonly known as 6048-6051 South Park Avenue, Chicago, Illinois; that said negroes aforementioned are not house servants, or janitors, or chauffeurs actually employed as such for service in and about the premises by the owner

or occupant of said premises, to the detriment of the plaintiffs and other signers of said restrictive agreement; that by reason of said violation the properties of said plaintiffs have depreciated greatly in value, and the income from said plaintiffs' properties has diminished by more than half; that some of the plaintiffs, by reason of the violation of said restrictive agreement by the defendant have been unable to rent their premises to white tenants; that said plaintiffs Howard C. Penoyer, Greta L. Penoyer, his wife, Fannie L. Schmelzer and Anton Lenczewski, have suffered irreparable damage and injury to their respective properties and rights; that the properties of the said plaintiffs last named are all located within a city block from the property of said Sarah Cohn, and that they will suffer further irreparable injury unless said restriction agreement is specifically enforced; that defendant Arthur W. Draper is the [fol. 429] trustee of a certain encumbrance upon the said property of Sarah Cohn, which has been executed and placed thereon since the said Restriction agreement went into effect and is bound thereby; that the legal holder or holders of the said encumbrance are unknown and are made parties hereto by the name and description of Unknown Owners and as such are bound by the terms of said restrictive agreement.

It is Therefore, Ordered, Adjudged and Decreed that said Restrictive Agreement recorded as Doc. 9914711, entered into by the defendant Sarah Cohn, and by the plaintiffs Howard C. Penoyer, Greta L. Penoyer, his wife, Fannie L. Schmelzer, Anton Lenczewski, or their predecessors in title, heretofore described, is now, and since the 1st day of February, A. D. 1928, has been in full force and effect, and binding on the defendant Sarah Cohn, and the other defendants as a covenant running with the land.

And it is further Ordered, Adjudged and Decreed that the Defendant Sarah Cohn, her servants, agents or attorneys, at his or her expense, within fifteen days from this date, dispossess, remove or cause to be dispossessed and remove any and all negroes or persons commonly called colored persons, and particularly the defendants Lovina Harrison, J. W. Brown, John Cobb, Gladys Jackson, Opal Timmons and Arcona Gordon, their agents, servants, or subtenants, or any or all of them now occupying the premises of the defendant Sarah Cohn, described as follows, towit:

Lot One (1) in Murry Wolbach's Resubdivision of Lots Twenty-four (24) to Twenty-eight (28) both inclusive, in Block One (1), in John J. Mitchell's South Park Sub- [fol. 430] division of Blocks Nine (9), Ten (10) and Eleven (11), in Maher's Subdivision of the South East Quarter (SE¼) of Section Fifteen (15), Township Thirty-eight (38) North, Range Fourteen (14), East of the Third (3rd) Principal Meridian, in Cook County, Illinois, commonly known as 6049 and 6051 South Park Avenue, Chicago, Illinois;

and any negroes or persons commonly called colored persons who may have come into possession of said premises or any part thereof since the filing of the complaint herein and service of summons on said Sarah Cohn, and on failure to so dispossess or remove them, or any or all of them within said fifteen days, that upon motion of the plaintiffs or any or either of them, a Writ of Assistance or other process do issue out of the office of the Clerk of this court, directed to the Sheriff of said County, to forthwith dispossess said defendants Lovina Harrison, J. W. Brown, John Cobb, Gladys Jackson, Opal Timmons and Arcona Gordon, and all persons of the negro race, or persons commonly called colored persons who may be in possession of said premises or any part thereof.

And it is further Ordered, Adjudged and Decreed that said defendants Sarah Cohn, Arthur W. Draper, Trustee, their agents, servants attorneys, or solicitors and each and all of them, absolutely desist and refrain from renting or leasing said premises or any part thereof to any negro or negroes, or persons commonly called a colored person, or permitting any such person to use or occupy said premises or any part thereof, or from selling, giving or conveying, or contracting to sell, give or convey said premises, or any part thereof, to any negro or negroes or persons [fol. 431] commonly called colored persons, until said restrictive agreement has been abrogated as provided therein.

And it is Further Ordered, Adjudged and Decreed that the plaintiffs have and recover from the defendant Sarah Cohn, the costs of this proceeding, including therein the sum of Sixty and 50/100 Dollars ($60.50) Master's fees, also the sum of Seven and 50/100 Dollars ($7.50) incurred and paid by the plaintiffs for services of court reporter for taking down and transcribing the testimony taken be-

fore the Master, and any further costs that plaintiffs may incur in the service of a Writ of Assistance to enforce this decree, and that they have execution against said Sarah Cohn therefor as at common law.

Enter: Signed) Harry B. Miller, Judge. Approved: (Signed) Sidney S. Pollack, Master in Chancery.

Filed: May 5, 1936. Frank V. Zintak, Clerk. By: Stanley Ovenue, Deputy.

The Witness: That made five out of seven properties on the east side of street and on another case that was filed involving property at 6043 and 6045 South Park Avenue, on December 12, 1934, in the Superior Court, entitled Fred C. Wilson, et al., v. Victor E. Eck, white ownership, but occupied by colored tenants. That case is still pending in the Superior Court.

[fol. 432] The other two buildings on the east side of the street, the one next to the southeast corner of 60th and South Park Avenue is a building owned by a lawyer by the name of Julius F. Smietanka, and the building just south of that is owned by the Prudential Life Insurance Company. We have an understanding with the owners of those two buildings——

Mr. Stratford: I object to any understanding.

The Witness: We offer to prove, if the Court please, that the owners of those two buildings will turn their buildings to white occupance, just as soon as we finish with the cases on the east side of South Park Avenue south of the buildings and that they acknowledge that the restrictive agreement is in full force and effect against these two buildings.

That covers the property on the east side of South Park Avenue. The Burke v. Kleiman case, we have offered as res adjudicata. The properties that were colored when Burke v. Kleiman was filed were the southeast corner of South Park Avenue and 60th street. I mean the decision in that case covered that property and the southwest corner of 60th street and South Park Avenue, the Hotel known as the South Way Hotel, just south of the southwest corner of South Park Avenue and 60th Street and the building at 417-19 E. 60th street, which was in-

volved in the Burke v. Kleiman case. The colored were dispossessed from the Kleiman building and the building has since that time been occupied by whites.

Then, outside of those three buildings, to wit, the southeast corner of 60th street and South Park, and the southwest corner of 60th and South Park, and the South Way Hotel, there was no violation on the west side of South [fol. 433] Park Avenue, except the case of Cook v. Yondorf, to which I have testified.

South of the Yondorf building is a big court building occupied by whites and between the Yondorf building and the South Way Hotel building is a six apartment building owned by the First National Bank of Englewood, which has been kept white during the entire period until recently. South of the Yondorf building is the court building owned by the Thomas E. Duffy estate, which is white and occupied by white tenants. That has about 40 apartments. South of the Duffy building is another six apartment building owned by the First National Bank of Englewood, which has always been white and not occupied by colored.

South of that is the property which fronts on the northwest corner of 61st Street and South Park Avenue, and is white. That is a store, apartments above and the store and that has always been occupied by whites and owned by white people.

That is all of the violations. The only building that is colored in that subdivision is the building now occupied by Mr. Truman K. Gibson, Sr., and his family, known as the Ellis building at 421 and 423 60th Street, a three-apartment building which was not signed up in this restrictive agreement and that is all the violations that have occurred during the five years that I have represented the Property Owners' and no other property in the subdivision has been owned or occupied by colored people.

There has been some evidence here of some colored moving into the building on the southwest corner of Vernon [fol. 434] Avenue and 60th Street. That has occurred since the filing of the complaint in this case.

Whereupon the plaintiffs rested their case in rebuttal.

There is no certificate that this was all the evidence heard or taken in the case.

Charles A. Churan, Schuyler & Hennessy, Angus Roy Shannon, Attorneys for Plaintiffs.

PLAINTIFFS' EXHIBIT 5

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THIS AGREEMENT entered into this 30 day of September 1927 by and between the undersigned owners of land on the one or the other side of Evans, Langley, Champlain, St.Lawrence, Rhodes, Eberhart, Vernon and South Park Avenues between 60th and 63rd Streets and on 60th, 61st and 62nd Streets between South Park and Cottage Grove Avenues, in the City of Chicago, witnesseth, that

Whereas, the following named persons own the respective parcels of land in said area set immediately under their names, having the frontage hereinafter set forth:

EVIDENCE
SUPERIOR COURT COOK COUNTY,
EXHIBIT
FILED
SIDNEY S. ELLICK,
CLERK IN CHANCERY, SUPERIOR COURT
COOK COUNTY, ILLINOIS

AND, WHEREAS, the parties hereto feel that the restrictions and covenants hereinafter imposed and created are for the best interests of all the parties hereto and of the property hereinbefore described.

IN CONSIDERATION of the premises and of the mutual covenants hereinafter made, and of the sum of Five Dollars ($5.00) in hand paid to each of the parties hereto by each of the other parties hereto, the receipt of which is hereby acknowledged, each party as owner of the parcel of land above described immediately under his name, does hereby covenant and agree with each and every other of the parties hereto, that his said parcel of land is now and until January 1, 1948, and thereafter until this agreement shall be abrogated as hereinafter provided, shall be subject to the restrictions and provisions hereinafter set forth, and that he will make no sale, contract of sale, conveyance, lease or agreement and give no license or permission in violation of such restrictions or provisions, which are as follows:

1. The restriction that no part of said premises shall in any manner be used or occupied directly or indirectly by any negro or negroes, provided that this restriction shall not prevent the occupation, during the period of their employment, of janitors' or chauffeurs' quarters in the basement or in a barn or garage in the rear, or of servants' quarters by negro janitors, chauffeurs or house servants, respectively, actually employed as such for service in and about the premises by the rightful owner or occupant of said premises.

2. The restriction that no part of said premises shall be sold, given, conveyed or leased to any negro or negroes, and no permission or license to use or occupy any part thereof shall be given to any negro except house servants or janitors or chauffeurs employed thereon as aforesaid.

The covenants, restrictions, and agreements herein contained shall be considered as appurtenant to and running with the land, and shall be binding upon and for the benefit of each party hereto and may be enforced by any of the parties hereto by any permissible legal or equitable proceedings, including proceedings to enjoin violation and for specific performance; provided, however, that in any action brought to set aside any deed made in violation of any of the provisions of this agreement, it shall be a good defense thereto that prior to the institution of such suit, the title to the premises then in question had become vested in, and was then owned by, a corporation or a white person, for value; and provided, further, that the lien of no mortgage or trust deed in the nature of a mortgage shall be impaired or invalidated by reason of the breach of any of the provisions of this agreement, whether any such breach shall have occurred prior or subsequent to the recording of any such mortgage or trust deed: and provided, further, that nothing contained in the foregoing provisos shall in any manner impair the right of any person or persons interested to enforce at all times and against all persons the restrictions in this agreement contained prohibiting the use or occupation of all or any part of said premises by a negro or negroes.

This agreement and the restrictions herein contained shall be of no force or effect unless this agreement or a substantially similar agreement, shall be signed by the owners above enumerated of ninety-five per centum of the frontage above described, or their heirs or assigns, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31, 1928. Provided, however, that if the owner of any of said parcels or of any part thereof shall be under disability, as, for example, that of minority, or for any other reason shall not have the power to execute this agreement, as, for example, when the title is held without such power, by testamentary trustees or other fiduciaries, the frontage so owned shall be treated as though the owners thereof had power to sign, and had signed this agreement, for the purpose of determining whether this agreement becomes effective or not under the provisions of this paragraph.

It is understood that for convenience a number of counterpart or concurrent instruments have been prepared, of even date herewith, the text of each of which is substantially the same as that of this instrument, and that the execution of any one of such instruments shall have the same effect as the execution of this instrument by the same person would have, and it is understood that parties to this agreement shall include not only those persons who shall sign this instrument but also all persons who shall sign any of said counterpart or concurrent instruments, and that this instrument and all of said counterpart or concurrent instruments shall constitute one agreement. It being contemplated that changes in ownership may occur between the date which this instrument bears and the date when it shall become effective, or that there may possibly be some misrecital of ownership herein contained, it is further understood that the execution hereof by the person who shall be the owner of any of said parcels of land at the time of such execution shall have the same effect as though such person had been the owner thereof on the date hereof and was so described herein, whether the recital of ownership herein contained be made to conform to the facts at the time of execution

or not. And if, in order to conform to the facts as to ownership at the time of execution, the recital of ownership in any of said instruments shall be made different from that contained in the others, that difference shall not prevent all of such instruments from being construed to be substantially similar to each other.

No restriction imposed hereby shall be abrogated or waived by any failure to enforce the provisions hereof no matter how many violations or breaches may occur.

This agreement and the restrictions herein expressed may be abrogated at any time on or after January 1, 1948, by the written agreement of the owners of seventy-five per centum of the frontage owned by the parties who shall sign this agreement, as herein set forth, such abrogation to be effective from and after the date of delivery and recording of such written agreement. Provided, however, that if the owner of any of said parcels or any part thereof shall be under disability, as, for example, that of minority, or for any other reason shall not have the power to execute such abrogation agreement, as, for example, when the title is held, without such power, by testamentary trustees or other fiduciaries, the frontage so owned shall be treated as though the owners thereof had power to sign, and had signed, such abrogation agreement, for the purpose of determining whether such abrogation agreement becomes effective or not under the provisions of this paragraph.

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The invalidity of any restriction hereby imposed, or of any provision hereof, or of any part of any such restriction or provision shall not impair or affect in any manner the validity, enforceability or effect of the rest of this agreement.

Pronouns herein employed in the masculine gender shall be construed to include the feminine and neuter genders, and the word "party" or "persons" to include natural and artificial parties or persons.

The term "negro" as used herein shall include every person having one-eighth part or more of negro blood, or having any appreciable admixture of negro blood, and every person who is what is commonly known as a colored person.

In any case where there is a recorded lease of any parcel of the property described herein for a term ending more than five years after any given date the owner of the reversion and the owner of the leasehold estate together shall be deemed to be the owners of such parcel on such given date within the meaning of this contract, and whenever the signature of the owner of such parcel shall be required on such given date under the provisions hereof, the signatures of both shall be required, provided that whatever interest any signer of this instrument owns in any of said property shall be bound by the provisions hereof. Lessees under unrecorded leases on any given date and under leases for terms ending less than five years after such given date shall not be regarded as owners within the meaning of this contract.

The undersigned spouses of owners of land herein described join herein for the purpose of signifying their assent hereto and of subjecting their rights of dower, if any, to the restrictions and provisions imposed hereby.

Time is of the essence of this contract and all the terms, conditions and provisions hereof.

The covenants, restrictions and agreements herein contained shall be binding on, and for the benefit of, and may be enforced by and against each party hereto, his successors and assigns, and the heirs, executors, administrators and successors of them respectively.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first aforesaid.

Lena Seff
Benjamin Seff (SEAL)
Owner of above described Parcel No. 31

Rose M. Lampoulis
Frank C. Lampoulis (SEAL)
Owner of above described Parcel No. 32

Emma W. Meschke
August F. Meschke Jr. (SEAL)
Owner of above described Parcel No. 28

James L. Buffo
Veronica Buffo (SEAL)
Owner of above described Parcel No. 27

Olen D. Stalcup
Nelle McClelland Stalcup (SEAL)
Owner of above described Parcel No. 33

PAGE 1.

9A

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Owner of above described Parcel No. 261 (SEAL)

Owner of above described Parcel No. 262 (SEAL)

Owner of above described Parcel No. 263 (SEAL)

Owner of above described Parcel No. 264 (SEAL)

Owner of above described Parcel No. 265 (SEAL)

Owner of above described Parcel No. (SEAL)

Owner of above described Parcel No. 267 (SEAL)

Owner of above described Parcel No. 268 (SEAL)

Owner of above described Parcel No. 269 (SEAL)

Owner of above described Parcel No. 270 (SEAL)

Owner of above described Parcel No. 271 (SEAL)

Owner of above described Parcel No. 272 (SEAL)

Owner of above described Parcel No. 273 (SEAL)

Owner of above described Parcel No. 274 (SEAL)

Owner of above described Parcel No. 275 (SEAL)

Owner of above described Parcel No. 276 (SEAL)

Owner of above described Parcel No. 277 (SEAL)

Owner of above described Parcel No. 278 (SEAL)

Owner of above described Parcel No. (SEAL)

Owner of above described Parcel No. 240-271 (SEAL)

Owner of above described Parcel No. 241 (SEAL)

Owner of above described Parcel No. 242 (SEAL)

Owner of above described Parcel No. 243 (SEAL)

Owner of above described Parcel No. 244 (SEAL)

Owner of above described Parcel No. 245 (SEAL)

Owner of above described Parcel No. 246 (SEAL)

Owner of above described Parcel No. 247 (SEAL)

Owner of above described Parcel No. 248 (SEAL)

Owner of above described Parcel No. 249 (SEAL)

Owner of above described Parcel No. 250 (SEAL)

Owner of above described Parcel No. 251 (SEAL)

Owner of above described Parcel No. 252 (SEAL)

Owner of above described Parcel No. 253 (SEAL)

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Helen Katz
Israel Katz
Owner of above described Parcel No. (SEAL) 481

Laura B. Stebbens (SEAL)
Owner of above described Parcel No. 482
John F. Campbell
Mrs Fannie Deniard (SEAL)
Owner of above described Parcel No. 483

Owner of above described Parcel No. (SEAL)
Anton Lemperowski
Sarah Lemperowski (SEAL)
Owner of above described Parcel No. 484

Katherine Beck (SEAL)
Owner of above described Parcel No. 485

Anna Dombrowski (SEAL)
Owner of above described Parcel No. 486

H C Grant (SEAL)
Owner of above described Parcel No. 487

Sarah A. Lee (SEAL)
Owner of above described Parcel No. 488

Nora Downey (SEAL)
Owner of above described Parcel No. 489

E Weeks Estate (SEAL)
Owner of above described Parcel No. 490

Owner of above described Parcel No. (SEAL)

Miss Ellen McShane (SEAL)
Owner of above described Parcel No. 493
Jacob Stanfield
Owner of above described Parcel No. (SEAL) 494

Janine L Searle (SEAL)
Owner of above described Parcel No. 495

Theresa Grassi (SEAL)
Owner of above described Parcel No. 496
James F Ford
Anna A Ford
Owner of above described Parcel No. (SEAL) 497
Hannah M. Studdert
do
Owner of above described Parcel No. (SEAL) 498

Donald Munroe
Eva Munroe
Owner of above described Parcel No. (SEAL) 499

Adolf Senatzberg
Rose Schatzberg (SEAL)
Owner of above described Parcel No. 500
Anna Madsen
Peter Madsen
Owner of above described Parcel No. (SEAL) 501

Owner of above described Parcel No. (SEAL) 502

Owner of above described Parcel No. (SEAL)

Alma Fleming
Thomas F Fleming (SEAL)
Owner of above described Parcel No. 910
Katherine Strobel
Owner of above described Parcel No. (SEAL) 311

Owner of above described Parcel No. (SEAL)
Owner of above described Parcel No. (SEAL) 312
Hattie Cohen
Owner of above described Parcel No. (SEAL) 313

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STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Fred L Helman, a Notary Public in and for the said County, in the State aforesaid, do hereby certify that C. D. Macauley Asst Treas of Wolfinger Co. personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 19 day of Jan A. D. 1928

Fred L Helman
NOTARY PUBLIC

STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Fred L Helman, a Notary Public in and for the said County, in the State aforesaid, do hereby certify that Sam Somerman and Ev Somerman personally known to me to be the same person whose name are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 19 day of Jan A. D. 1928

Fred L Helman
NOTARY PUBLIC

STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Fred L Helman, a Notary Public in and for the said County, in the State aforesaid, do hereby certify that Harry Young Katharine Young personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 21 day of Jan A. D. 1928

Fred L Helman
NOTARY PUBLIC

STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Alfred James Davison, a Notary Public in and for the said County, in the State aforesaid, do hereby certify that Jacob & Elizabeth Repholz personally known to me to be the same person whose name are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 24th day of Jan A. D. 1928

Alfred James Davison
NOTARY PUBLIC

Rec'd 5 ft.

STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Fred L Hilman, a Notary Public in and for the said County,
in the State aforesaid, do hereby certify that Frank H P Castek
known to me to be the same person whose name is subscribed to the foregoing instrument,
appeared before me this day in person and acknowledged that he signed, sealed and delivered the said
instrument as his free and voluntary act, for the uses and purposes therein set forth, including the
release and waiver of the right of homestead.
Given under my hand and notarial seal this 6th day of October A. D. 1927

Fred L Hilman
NOTARY PUBLIC

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STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Alfred James Dawson, a Notary Public in and for the said County,
in the State aforesaid, do hereby certify that W J Harrower + Mary F Harrower
known to me to be the same person whose names are subscribed to the foregoing instrument,
appeared before me this day in person and acknowledged that they signed, sealed and delivered the said
instrument as their free and voluntary act, for the uses and purposes therein set forth, including the
release and waiver of the right of homestead.
Given under my hand and notarial seal this 6th day of Oct A. D. 1927

Alfred James Dawson
NOTARY PUBLIC

STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Joseph T Sheedy, a Notary Public in and for the said County,
in the State aforesaid, do hereby certify that Vincent F Stefanucci Rosezyk
known to me to be the same person whose name is subscribed to the foregoing instrument,
appeared before me this day in person and acknowledged that they signed, sealed and delivered the said
instrument as their free and voluntary act, for the uses and purposes therein set forth, including the
release and waiver of the right of homestead.
Given under my hand and notarial seal this 13th day of October A. D. 1927

Joseph T Sheedy
NOTARY PUBLIC

STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Joseph T. Sheedy, a Notary Public in and for the said County,
in the State aforesaid, do hereby certify that Elizabeth A. Costello
known to me to be the same person whose name is subscribed to the foregoing instrument,
appeared before me this day in person and acknowledged that she signed, sealed and delivered the said
instrument as her free and voluntary act, for the uses and purposes therein set forth, including the
release and waiver of the right of homestead.
Given under my hand and notarial seal this 10th day of October A. D. 1927

Joseph T Sheedy
NOTARY PUBLIC

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STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Alfred James Dawson a Notary Public in and for the said County, in the State aforesaid, do hereby certify that Mary Margaret Emma Daly

personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

GIVEN under my hand and notarial seal this 1st day of November A. D. 1927

Alfred James Dawson
NOTARY PUBLIC

STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Joseph P. Sheedy a Notary Public in and for the said County, in the State aforesaid, do hereby certify that John and Mrs. J. E. Braziell

personally known to me to be the same person whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

GIVEN under my hand and notarial seal this 3rd day of November A. D. 1927.

Joseph P. Sheedy
NOTARY PUBLIC

STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Joseph P. Sheedy a Notary Public in and for the said County, in the State aforesaid, do hereby certify that Trinidad H. Olsen

personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

GIVEN under my hand and notarial seal this 5th day of November A. D. 1927.

Joseph P. Sheedy
NOTARY PUBLIC

STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Joseph P. Sheedy a Notary Public in and for the said County, in the State aforesaid, do hereby certify that Ralph S. and Anna M. Lee

personally known to me to be the same person whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

GIVEN under my hand and notarial seal this 5th day of November A. D. 1927.

Joseph P. Sheedy
NOTARY PUBLIC

STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Joseph P. Sheedy, a Notary Public in and for the said County,
in the State aforesaid, do hereby certify that Morris and Ida Stein
personally known to me to be the same person whose name is subscribed to the foregoing instrument,
appeared before me this day in person and acknowledged that they signed, sealed and delivered the said
instrument as their free and voluntary act, for the uses and purposes therein set forth, including the
release and waiver of the right of homestead.

GIVEN under my hand and notarial seal this 23rd day of December A. D. 1927

Joseph P. Sheedy
NOTARY PUBLIC

BOOK 5595 PAGE 183

STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Joseph P. Sheedy, a Notary Public in and for the said County,
in the State aforesaid, do hereby certify that Helen and Israel Katz
personally known to me to be the same person whose names are subscribed to the foregoing instrument,
appeared before me this day in person and acknowledged that they signed, sealed and delivered the said
instrument as their free and voluntary act, for the uses and purposes therein set forth, including the
release and waiver of the right of homestead.

GIVEN under my hand and notarial seal this 25th day of October A. D. 1927

Joseph P. Sheedy
NOTARY PUBLIC

STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Joseph P. Sheedy, a Notary Public in and for the said County,
in the State aforesaid, do hereby certify that Katherine Beck
personally known to me to be the same person whose name is subscribed to the foregoing instrument,
appeared before me this day in person and acknowledged that she signed, sealed and delivered the said
instrument as her free and voluntary act, for the uses and purposes therein set forth, including the
release and waiver of the right of homestead.

GIVEN under my hand and notarial seal this 29th day of November A. D. 1927.

Joseph P. Sheedy
NOTARY PUBLIC

STATE OF ILLINOIS
COUNTY OF COOK ss:

I, Joseph P. Sheedy, a Notary Public in and for the said County,
in the State aforesaid, do hereby certify that Anna Dandurand
personally known to me to be the same person whose name is subscribed to the foregoing instrument,
appeared before me this day in person and acknowledged that she signed, sealed and delivered the said
instrument as her free and voluntary act, for the uses and purposes therein set forth, including the
release and waiver of the right of homestead.

GIVEN under my hand and notarial seal this 18th day of October A. D. 1927

Joseph P. Sheedy
NOTARY PUBLIC

PLAINTIFFS' EXHIBIT 5-6

BOOK 25525 PAGE 40

Resub of Blocks 11-12
Block 1 — Washington Park Club Addition to Chicago, A subd'n of the S. 1/2 of the S.E. 1/4 sec.15 T38 R14

Parcel No.	Rhodes Ave.		Frontage Feet
235	146107	John B. Bazinet: Lot 3	30
236	146111	Chas. Boy: Lot 4	30
237	146115	Lena Staat: Lot 5	30
238	146117	Frank Powell: Lot 6	30
239	146119	Ellen Donohue: Lot 7	30
240	146121	Peter Fabisch: Lot 8	30
241	146125	Clara Mayer: Lot 9	30
242	146129	Eric Erickson; Lot 10	30
243	146131	Blanche Moisant: Lot 11	30
244	~~6135~~	~~Rebecca Gaolensky: Lot 12~~	30
245	146137	W. P. Mahoney: Lot 13	30
246	146141	Mrs. Thos. Farrell: Lot 14	30
247	146143	Mathilda Plum: Lot 15	30
248	146147	Geo. C. Hoffman: LOt 16	30
249	146149	E. Rickards: Lot 17	30
250	146151	Delia V. Dunn: Lot 18	30
251	146155-59	Fred Henderson: Lots 19 and 20	60

Resub of blocks 11-12
Block 2 — Washington Park club Addition to Chicago

Parcel No.	Rhodes Ave.		
252	146100-06	Alex Wall: Lots 39 and 40	57
253	136108	Elmo C. Lieber: Lot 38	30
254	136110	Simon Hirsch: Lot 37	30
255	136114	Katherine Daly: Lot 36	30
256	136116	Terrance Sullivan: Lot 35	30
257	136120	John F. Healy: Lot 34	30
258	136122	Chas. A. Johnson: Lot 33	30
259	~~6101~~	~~Mrs. Stewart: Lot 32~~	30
260	136128	O. Olson: Lot 31	30
261	136130	Dennis P. Collins: Lot 30	30
262	146134	Victor E. Cole: Lot 29	30
263	146136	Patrick Burke: Lot 28	30
264	146140	Sam Sommerman: Lot 27	30
265	146142	E.L. Govanus: Lot 26	30
266	146146	M.J. McNerny: Lot 25	30
267	146148	Hugh Lee: Lot 24	30
268	136150	John Brazil: Lot 23	30
269	146154-58	Chas. Burkhart: Lots 22 and 21	60
	Eberhart Ave.		
270	176101-09	Meyer N.Finder: Lots 1-2-3	87
271	176111	Chas. Hyman: Lot 4	30
272	176115	Samuel Levin: Lot 5	30
273	176117-19	Louise G. Anderson: Lots 6 and 7	60
274	176123-25	Mary B. Anderson: Lots 8 and 9	60
275	176129-33	Jacob Gockenbach: Lots 10 and 11	60
276	176135-37	Sarah Nathan: Lot 12 & N.15ft.lot 13	45
277	176139	Marcus Adler: S.15ft.lot 13 & N. 10ft.lot 14	25
278	176145	Julia Loeff: S.20ft.lot 15 & N.5ft.lot 16	25
279	176149	Erte Thomas: Lot 17	30
280	176153-59	Jane Omeria: Lots 18-19-20	90

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Block 1 — John J. Mitchell's South Park Subd'n of blocks 9-10-11 in Maher's subd'n of the S.E. 1/4 sec.15 T38 R14

BOOK 25525 PAGE 48

Parcel No.	E. 60th St.		Frontage Feet
	PAGE		
470	19 417-19	Benjamin Piser: Lot 5	25
471	19 415	Frank H. Plaisted: Lot 6	25
472	19 413	Walter J. Harrower: Lot 7	25
473	19 411	Catherine Doncombe: Lot 8	25
474	19 401-09	Vincent Roszczyk: Lots 9-10 and 11	90.7
	South Park Avenue		
475	19 6019-21	Peter Fabisch: Lot s 12 and 13	50
476	19 6023-25	Celi Rieger: Lots 14 and 15	50
477	19 6029-31	Louis Ellis: Lots 16 and 17	50
478	19 6033-35	Chas. Andresunas: Lots 18 and 19	50
479	19 6037-39	Fred H. Wolfe: Lots 20 and 21	50
480	19 6043-45	Peter G. Erickson: Lots 22 and 23	50
	Vernon Avenue		
481	19 6018	Israel Katz: Lot 45	25
482	19 6020	Laura B. Stebbins: Lot 44	25
483	19 6022	J. P. Campbell: N. 16 2/3ft.lot 43	16 2/3
484	19 6028-30	Anton Lenczewski: Lots 40 and 41	50
485	19 6032-34	J. W. Beck: Lots 38 and 39	50
486	19 6036-38	Anna Dandurand: Lots 37-36 & N.21in.Lot 35	50' 2"
487	19 6042-44	Fred C. Grant: Lot 35 (Except N.21in.) and Lot 34	49' 10"
488	19 6046	Sarah O. Hill: Lot 33	25
489	19 6050-52	Martin Downey: Lot 32 and 31	50
490	19 6054-58	E. Winters Estate: Lots 30 and 29	58.45
491	19 6047 South Park Avenue	Sarah Cohen: Lot 1 in Wolbach's Resub of lots 24 to 28 in Maher's Subd'n of S.E.1/4 sec.15 T38 R14	50

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UNITED STATES OF AMERICA

STATE OF ILLINOIS, SS:

At a Term of the Supreme Court, Begun and held at Springfield on Tuesday, the Fourth day of April in the year of our Lord One Thousand Nine Hundred and Forty, within and for the State of Illinois,

Present: Elwyn R. Shaw, Chief Justice; Justice Clyde E. Stone, Justice Norman L. Jones, Justice Francis S. Wilson, Justice Warren H. Orr, Justice Paul Farthing, Justice Walter T. Gunn, John E. Cassidy, Attorney General; Warren C. Murray, Marshal. Attest: Adam F. Bloch, Clerk.

Be it remembered, that to-wit, on the 18th day of April, A. D. 1939, the same being one of the days of the said April term of Court aforesaid, the following proceedings were by said Court had and entered of record in the words and figures as follows, to-wit:

No. 25116

Appeal from Circuit Court Cook County

ANNA M. LEE, ET AL., Appellees,

vs.

CARL A. HANSBERRY, et al., Appellants

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court and it appearing to the Court that appellants have filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellees having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Supreme Court, begun and held in Springfield, on Tuesday, the Third day of October in the year of our Lord, One Thousand Nine Hundred and Thirty-nine, within and for the State of Illinois.

Present: Chief Justice Francis S. Wilson, Justice Clyde E. Stone, Justice Paul Farthing, Justice Walter T. Gunn, Justice Norman L. Jones, Justice Elwyn R. Shaw, Justice Loren E. Murphy, John E. Cassidy, Attorney General; Warren C. Murray, Marshal. Attest: Adam F. Bloch, Clerk.

Be It Remembered, that afterward, to-wit, on the 10th day of October 1939 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 25116

Appeal from Circuit Court Cook

ANNA M. LEE ET AL., Appellees,

vs.

CARL A. HANSBERRY, ET AL., Appellants

Docket No. 25116—Agenda 19—April, 1939

Anna M. Lee et al., Appellees, v. Carl A. Hansberry, et al., Appellants

Mr. Justice JONES delivered the opinion of the court:

Plaintiffs, (appellees here) brought an action in the circuit court of Cook county for the purpose of enforcing a certain "restrictive agreement" concerning the real estate of approximately five hundred owners in the city of Chicago. The substance of this agreement, set forth in haec verba in Burke v. Kleiman, 277 Ill. App. 519, was that no part of the property restricted should be sold, leased to, or permitted to be occupied by any person of the colored race prior to January 1, 1948. The property covered by the agreement consists of approximately twenty-seven blocks

and parts of blocks between Sixtieth and Sixty-third Streets, and between Cottage Grove and South Park avenues in Chicago. The agreement contained the following provision: "This agreement and the restrictions herein contained shall be of no force or effect unless this agreement or a substantially similar agreement, shall be signed by the owners above enumerated of ninety-five per centum of the frontage above described, or their heirs or assigns, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31st, 1928."

The complaint alleged that the owners of ninety-five per cent of the frontage signed the agreement, and that it was recorded February 1, 1928. It further alleged a conspiracy on the part of the defendants to destroy the agreement by selling or leasing property in the restricted area to Negroes. It charged that Eva Sommermon, one of the signers of the agreement, conveyed her property to one Stoltz, who, on the same day, conveyed it to the First National Bank of Englewood; that, through fraudulent concealment on the part of defendants James J. Burke and Harry A. Pace, from the bank, of the fact Hansberry was a Negro and that the property was being purchased for him, a deed was procured from the bank to Jay B. Crook, who, in fact, purchased for Hansberry; that the deed from the bank to Crook was not delivered until May 26, 1937, but that on May 19, 1937, Crook and his wife executed and delivered a trust deed to the Chicago Title and Trust Company, as trustee, to secure their note for $4400 payable to defendant the Supreme Liberty Life Insurance Company, of which defendant, Pace, a colored attorney, was president. May 26, 1937, the day the deed was delivered, Hansberry and his family moved into the premises.

The answer of defendants denied that the owners of ninety-five per cent of the frontage described in the restrictive agreement had signed the agreement, and asserted the agreement never went into effect. It also denied the principal allegations of the complaint and set up several affirmative defenses. To the defense that the agreement was never executed plaintiffs replied that that question was res judicata, having been determined in Burke v. Kleiman, supra, and in other cases in the circuit and superior courts of Cook county. The chancellor reserved his ruling on the plea of res judicata and the cause proceeded to a hearing on the merits. At the close of the evidence the court found

that the owners of only about fifty-four per cent of the frontage had signed the agreement, but held the question of execution was res judicata. A decree was entered in conformity with the prayer of the complaint, restraining defendant Burke from selling or leasing any real estate within the restricted area to Negroes, or to white persons for the purpose of selling or leasing to Negroes; restraining defendant Katz from selling or leasing a certain described building to Negroes; restraining defendants Pace and the Supreme Liberty Life Insurance Company from making any further loans on real estate in the restricted area to Negroes or for occupancy by Negroes; declaring the conveyance to Hansberry and wife void and ordering them to remove from the premises, and holding the restrictive agreement valid and in full force and effect. Inasmuch as a freehold is involved, defendants have appealed directly to this court.

In order to decide whether the question of due execution is res judicata, it will be necessary to examine the case of Burke v. Kleiman, supra. That was a suit to enforce this same agreement. Olive Ida Burke, wife of James J. Burke, a defendant in the case at bar, was plaintiff. The complaint recited that she filed it "on behalf of herself and on behalf of all other property owners in the district covered and affected by the agreement hereinafter mentioned, and who are, or whose grantors, direct or otherwise, were parties to said indenture of agreement, and whose property interests will be adversely and injuriously affected by the violation hereinafter mentioned by the said defendants of the covenants and terms of said agreement." The defendants were Isaac Kleiman, the white owner, Sam Kleiman, James L. Hall, a Negro tenant, and Charles J. Sopkin, trustee of a trust deed on the property. The complaint alleged the agreement was signed by the owners of ninety-five per cent of the frontage and duly recorded February 1, 1928. A stipulation was entered into to this effect. The court recited the stipulation in its decree and found that the facts stipulated were true. The court further found, "that said indenture was in full force and effect on February 1, 1928, and all conditions therein contained with respect to execution and recordation thereof, were fully complied with;" that "all terms of said indenture agreement are entirely valid and binding," and that it is a covenant running with the land. This decree was affirmed by the Appellate Court.

It thus appears that Burke v. Kleiman, supra, was a class or representative suit. It cannot be seriously contended that it was not properly a representative suit. There was a class of individuals who had common rights and who needed protection. They were so numerous it would have imposed an unreasonable hardship and burden on them to require all members to be made parties to the suit. Under such circumstances we have repeatedly held that a court of equity has jurisdiction of representative suits, and where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs, other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings. Groves v. Farmers State Bank, 368 Ill. 35; Leonard v. Bye, 361 id. 185; Greenberg v. City of Chicago, 256 id. 213.

Appellants contend the doctrine is inapplicable here for the reason there was no class, since the evidence shows the requirement that the owners of ninety-five per cent of the frontage sign the agreement, was not met. This argument loses sight of the fact that in Burke v. Kleiman, supra, the court had jurisdiction to determine whether or not that condition precedent had been complied with. The mere fact that it later appears that the finding is untrue does not render the decree any the less binding. The principle of res judicata covers wrong as well as right decisions, for the fundamental reason that there must be an end of litigation. A matter which has once been determined by a court of competent jurisdiction cannot, in a later suit involving the same subject matter and the same parties or members of the same class, be again inquired into.

We see no merit in the contention that Burke v. Kleiman, supra, is not res judicata because the fact of due execution was established by stipulation. There is no evidence of fraud or collusion in that case. Defendant Burke, who was beneficial owner of plaintiff's property, avers in his answer here that that suit was instituted at the instance of the Woodlawn Property Owners Association, whose purpose was the enforcement of the restrictive agreement. That may be true, but there is no showing of fraud or collusion in procuring that stipulation or that there was not an actual controversy in the case. At that time Burke was an officer of the Woodlawn Property Owners Association. Afterwards he resigned his position and withdrew from the association with ill feelings, and stated several

times that he would put Negroes in every block of that property. In carrying out his threat, he falsely represented that prospective customers were white. As far as the record shows, if any fraud was committed, it was by Burke after he left the association. It does not appear that he was not acting in good faith in Burke v. Kleiman, supra.

In our opinion the questions of execution and validity of the restrictive agreement are res judicata. The reasons assigned, in addition to those urged in Burke v. Kleiman, supra, for holding the agreement invalid cannot be considered. It is well settled that the doctrine of res judicata extends not only to matters actually determined in the former suit, but also embraces all grounds of recovery and defense involved and which might have been raised. By assigning new reasons for holding the agreement invalid, which existed at the time that decision was rendered, the parties cannot relitigate the question settled by the prior decree. In re Northwestern University, 206 Ill. 64; Midlinsky v. Rubin, 341 id. 378; People v. Wade, 351 id. 484; Webb v. Gilbert, 357 id. 340.

The evidence fully justifies the finding of the chancellor that the charges of the complaint were established, and appellants do not argue to the contrary, except as to Israel Katz. There was testimony that he said he would sell his property to anybody, including Negroes. This is sufficient evidence to warrant enjoining him from doing that which he is bound by the restrictive agreement not to do.

Appellants contend it was error to restrain the Supreme Liberty Life Insurance Company from making loans in the restricted area to Negroes or for Negro occupancy, for the reason mortgagees were expressly exempted from the operation of the restrictive agreement. The provision relied on is "and provided, further, that the lien of no mortgage or trust deed in the nature of a mortgage shall be impaired or invalidated by reason of the breach of any of the provisions of this agreement, whether any such breach shall have occurred prior or subsequent to the recording of any such mortgage or trust deed." The next clause is "and provided, further, that nothing contained in the foregoing provisions shall in any manner impair the right of any person or persons interested, to enforce at all times and against all persons the restrictions in this agreement contained prohibiting the use or occupation of all or any part of said

premises by a Negro or Negroes." That part of the agreement relied on merely provides that the loan or mortgage shall not be invalidated by reason of its being made in violation of the restrictive agreement. It does not give mortgagees a license to conspire to destroy the agreement, as the evidence shows this insurance company was doing. The decree simply restrains them from making such loans in the future; it does not attempt to hold any existing loans or mortgages invalid. The court did not err in this respect.

We cannot agree that the court erred in overruling appellants' motion to set aside the decree and for a new trial. This motion was supported by an affidavit of Fred L. Helman, which recited that Helman was executive secretary of the Woodlawn Property Owners Association from 1926 to 1933. The substance of the affidavit is that he had charge of the work of obtaining signatures to the restrictive agreement, and that at the time the case of Burke v. Kleiman, supra, was instituted, as a result of his own investigation, he knew that the owners of ninety-five per cent of the frontage involved had not signed the agreement, and that he conferred with various officials of the association in regard to the filing of that suit. The affidavit does not state that he communicated his information to anybody, or that Olive Ida Burke or any individual of the representative class for whose benefit the suit was brought, or any of the officers of the association, except Helman, knew of this fact. As far as the affidavit discloses Helman is the only person who knew of the defect. It does not allege the suit was brought at the request of the association or that it was not instituted by Mrs. Burke of her own volition and in good faith, for the benefit of herself and the other members of the class. The motion was properly denied.

The decree of the circuit court is affirmed.

Decree affirmed.

Mr. Justice SHAW, dissenting:

The opinion of the majority depends on its holding that the case of Burke v. Kleiman, supra, is res judicata of the points involved and that those points are not subject to further judicial examination. It is said first, that this was a class or representative suit, and second, that in that case the court had jurisdiction to determine whether or not the necessary ninety-five per cent of the frontage had signed

up. It is further insisted that the question of jurisdiction cannot be collaterally attacked but that the only remedy must have been by appeal from the judgment in that case.

The opinion of the trial judge is based entirely upon the grounds of res judicata and he very reluctantly felt himself bound by the prior decision. Reference to the abstract of record shows a definite finding of fact that the agreement was never signed by the requisite number of property owners and, in the words of the trial judge: "in other words, there is an invalid agreement which is now sought to be enforced * * * and we know it was a fraud because the proof now shows that there wasn't ninety-five per cent * * * he committed a fraud when he brought this law suit," etc.

The undisputed fact is that by means of fraud and collusion between total strangers an agreement which is void on its face has been imposed upon some ten million dollars worth of the property of five hundred other parties who were never in court, who never had notice of any law suit, who were never by name or as unknown owners made parties to any law suit, and who have never been accorded any process whatever, either due or otherwise. And it is said that this is binding upon them; that they constituted a class because one man fraudulently said they did and another man collusively, and with equal fraud, admitted the allegation, because this second man signed a stipulation saying they had signed an agreement which they had never signed. Certainly no man's rights can be safe under such a rule of law. If one man can allege that I signed an agreement and another total stranger admit that I signed it and fraudulently bind me by this sort of an agreement, it would be contrary to the Fourteenth amendment of the constitution of the United States. The trial judge found the entire case of Burke v. Kleiman tainted with fraud, procured by collusion, and intended only to validate an otherwise invalid agreement. He very reluctantly entered a decree in this case because of a mistaken idea that the former judgment was res judicata.

The opinion in this case states that the defendants were so numerous that it would have imposed an unreasonable hardship and burden to make them all parties to the suit. This is a definite overruling of Whitney v. Mayo, 15 Ill. 251. It is true there were five hundred defendants, but even the humblest of these five hundred had a right to his

day in court, to be made a party to the suit and to be given an opportunity to defend it. Their names were on the public records of Cook county and not the slightest excuse appears for not making them parties to the suit. If one sought to bind all the property in the city of Chicago by some restrictive covenant, he would assume the burden of making every property owner in that city a party to his suit, either by name or as unknown owner, if he was, in fact, unknown. He could not gain an advantage for himself through a fraudulent scheme simply by saying they were too numerous to mention.

The want of due process is so obvious as to require no argument and it must be admitted. It is said, however, that the court had jurisdiction to determine whether or not it had jurisdiction, and a mere restatement of this proposition refutes it. A court never has jurisdiction to determine that it has jurisdiction when it, in law, has not. The question of whether or not a court has jurisdiction of the parties and the subject matter remains forever open and forever subject to collateral attack. No court can expend its own jurisdiction simply by finding that it has jurisdiction unless that finding is based upon a question of fact which it has power to decide. In Caswell v. Caswell, 120 Ill. 377, and in many subsequent cases this rule has been made clear (Beck v. Lash, 303 Ill. 549). The most recent reference to it in this court is to be found in People v. Sterling, 357 Ill. 354, where we pointed out the distinction between that kind of fraud which goes to the jurisdiction of the court, as distinguished from that other kind which intervenes to procure a decree after the court has obtained a valid jurisdiction. The rule is too clear for restatement. Fraud which impairs or prevents attachment of jurisdiction may always be raised collaterally, and it is only that kind which intervenes after jurisdiction has been obtained that cannot be attacked.

We have in the case before us both kinds of fraud: Fraud in the procurement of the decree by a false stipulation, and a fraud going to the jurisdiction of the court in the very basic and essential allegation that there was a valid agreement that it was actually signed by the necessary ninety-five per cent of frontage owners, and fraud in the jurisdictional allegation that there was a class to be represented when, in fact, no such class ever existed.

It is my opinion that even if the attempted agreement had been signed by the owners of ninety-five per cent of the frontage involved, and if the case of Burke v. Kleiman had been brought in good faith instead of fraudulently, it still could not have been such a class or representative suit as would impair the title of other property owners. Without going into extensive citations of authority, it seems clear to me that a class suit cannot properly be entertained except in that very limited field of cases where the parties have not only a common and general interest among themselves but also an identical right to be protected in a single and undivided res. The entire theory of class representation is a dangerous exception to the general rule that each interested person must be made a party by name, notified of the proceedings and given his day in court. The rules guarding it must be so strict and carefully enforced as to be commensurate with the risks of injustice which are involved. Due process most certainly requires notice and an opportunity to be heard, and no case has come to my attention where the court has failed to make absolutely certain, in advance, that the parties to represent a class must be selected with such care and have such personal interest in the litigation as to guarantee that the rights of all will be fully protected.

In the case before us, each property owner held and owned his property in severalty. He might or might nor wish the covenant enforced. He might or might not wish to contest its validity. He might or might not wish to sell, lease or mortgage his property without regard to it. On any of these questions, his next door neighbor or any other property owner in the district might disagree with him. There could be no certainty nor even any probability that they would all agree on a course of conduct to be followed at any particular time or under any particular circumstances. There was no common right nor any common fund, nor any common or undivided res to be dealt with, and certainly no one ever had any right or power to speak for any one but himself.

The agreement which formed the foundation for this fraudulent case of Burke v. Kleiman provided on its face that it should be void and of no force or effect unless signed by the owners of ninety-five per cent of the frontage involved within a certain time and placed of record within a certain date. To me, it seems obvious that until those

signatures were obtained and the very terms of the agreement itself complied with, there could by no possibility be even the semblance of a class to be represented in a class suit, even if such a suit could be possible under the circumstances, and it seems to be equally beyond question that such a defect in signers could not, in a court of chancery, be obviated through a fraudulent allegation that they had, in fact, been obtained when they had not, and an equally fraudulent and collusive and false stipulation that the owners had signed.

Mr. Justice Murphy concurs in this dissenting opinion.

UNITED STATES OF AMERICA, ss:

SUPREME COURT, STATE OF ILLINOIS

At a Supreme Court, begun and held in Springfield, on Tuesday, the Third day of October in the year of our Lord, One Thousand Nine Hundred and Thirty-nine within and for the State of Illinois.

Present, Chief Justice Francis S. Wilson, Justice Clyde E. Stone, Justice Paul Farthing, Justice Walter T. Gunn, Justice Norman L. Jones, Justice Elwyn R. Shaw, Justice Loren E. Murphy, John E. Cassidy, Attorney General, Warren C. Murray, Marshal, Attest: Adam F. Block, Clerk.

Be it Remembered, that, to-wit: on the 10th day of October, A. D. 1939, the same being one of the days of the said October term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following to-wit:

October 10, A. D. 1939.

No. 25116

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, LOUISE G. ANDERSON, Lyman M. Anderson and Kathryn Luttrell, Appellees,

vs.

CARL A. HANSBERRY, NANNIE L. HANSBERRY, JAMES JOSEPH BURKE, Harry H. Pace, Supreme Liberty Life Insurance Company, a corporation, Israel Katz, Appellants

Appeal from Circuit Court Cook County

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and in-

spected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the Decree of the Circuit Court of Cook County aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellees recover of and from the said Appellants Costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Adam F. Bloch, Clerk of the Supreme Court of the State of Illinois and Keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Testimony Whereof, I have set my hand and affixed the Seal of the said Supreme Court, in Springfield, in said State, this 1st day of March, A. D. 1940.

Adam F. Bloch, Clerk Supreme Court. (Seal.)

UNITED STATES OF AMERICA, SS:

SUPREME COURT, STATE OF ILLINOIS

At a Term of the Supreme Court, begun and held in Springfield, on Tuesday, the Fifth day of December, in the year of our Lord, One Thousand Nine Hundred and Thirty-nine, within and for the State of Illinois.

Present: Frances S. Wilson, Chief Justice; Justice Clyde E. Stone, Justice Jaul Farthing, Justice Walter T. Gunn, Justice Norman L. Jones, Justice Elwyn R. Shaw, Justice Loren E. Murphy, John E. Cassidy, Attorney General; Warren C. Murray, Marshal. Attest: Adam F. Bloch, Clerk.

Be it remembered, that to-wit, on the 13th day of December, A. D. 1939, the same being one of the days of the said December term of Court aforesaid, the following pro-

ceedings were by said Court had and entered of record in the words and figures as follows, to-wit:

No. 25116

ANNA M. LEE et al., Appellees,

vs.

CARL A. HANSBERRY et al., Appellants

Appeal from Circuit Court, Cook County

Now on this day the Court having duly considered the petition for rehearing filed herein and the Court being now advised in the premises doth overrule the prayer of the petition and denies a rehearing of this cause.

Be it remembered, that to-wit, on the 28th day of February, 1940, there was filed in the office of the Clerk of the Supreme Court of Illinois by Anna M. Lee, et al., appellants, their Praecipe for Record which original Praecipe for Record is as follows, to-wit:

IN THE SUPREME COURT OF ILLINOIS, MARCH TERM, A. D. 1940

Gen. No. 25116

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, Louise G. Anderson, Lyman M. Anderson, and Kathryn Mitchell, Appellants,

vs.

CARY A. HANSBERRY, NANNIE L. HANSBERRY, JAMES JOSEPH BURKE, Harry H. Pace, Supreme Liberty Life Insurance Company, a Corporation, Israel Katz, Appellees

PRAECIPE FOR RECORD

The Clerk of the Supreme Court of Illinois will make up a complete and certified transcript of the record in the above entitled cause for filing in the Supreme Court of the United States, and is directed to insert therein:

1. The Abstract of Proceedings.
2. The Order of Submission.

3. The Opinion rendered by the Supreme Court of Illinois.

4. The Final Order.

5. The Order denying Petition for Rehearing.

6. Certified copy of the Abstract of Record filed by Appellants in the Supreme Court of Illinois.

7. Certified copy of the Abstract of Record (Vols. 1-2) filed by Appellees in the Supreme Court of Illinois.

8. The Praecipe and Transcript for the Record.

9. A certificate that the same is a certified transcript of all the proceedings had in the Supreme Court of Illinois.

Earl B. Dickerson, Truman K. Gibson, Jr., Irvin C. Mollison, C. Francis Stradford, Loring B. Moore, Attorneys for Appellants, by Earl B. Dickerson.

[Endorsed:] General No. 25116. In the Supreme Court of Illinois. Anna M. Lee et al. vs. Carl A. Hansberry et al. Præcipe for Record. Earl B. Dickerson, Truman K. Gibson, Jr., Irvin C. Mollison, C. Francis Stradford, Loring B. Moore, Attorneys for Appellants. Filed Feb. 28, 1940. Adam F. Bloch, Clerk.

SUPREME COURT, STATE OF ILLINOIS, ss.

I, Adam F. Bloch, Clerk of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the above and foregoing to be a true copy of Transcript of Record (incorporating Abstracts) for filing on petition for Certiorari in United States Supreme Court, in a certain cause entitled in this Court Anna M. Lee, et al., Appellees, vs. Carl A. Hansberry, et al., Appellants, No. 2516, Appeal Circuit Court Cook, filed in this office on the 11th day of February, A. D. 1939.

Witness my hand and Seal of said Supreme Court, at Springfield, in said State, this 1st day of March, A. D. 1940.

Adam F. Bloch, Clerk. (Seal of the Supreme Court, State of Illinois.)

[fol. 26] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 22, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 44,210. Illinois Supreme Court. Term No. 29. Carl A. Hansberry, Nannie L. Hansberry, et al., Petitioners, vs. Anna M. Lee, Edward L. Govanus, Esther Govanus, et al. Petition for a writ of certiorari and exhibit thereto. Filed March 11, 1940. Term No. 29, O. T., 1940.

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FILE COPY

FILED
MAR 11 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. [redacted] 29

CARL A. HANSBERRY, NANNIE L. HANSBERRY, SUPREME LIBERTY LIFE INSURANCE COMPANY, a corporation, HARRY H. PACE, JAMES JOSEPH BURKE and ISRAEL KATZ,

Petitioners,

vs.

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, LOUISE G. ANDERSON, LYMAN M. ANDERSON and KATHRYN LUTTRELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

EARL B. DICKERSON,
TRUMAN K. GIBSON, JR.,
C. FRANCIS STRADFORD,
LORING B. MOORE,
IRVIN C. MOLLISON,
Attorneys for Petitioners.

BARNARD & MILLER, Printers, FRAnklin 0662, CHICAGO

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I. A property owners' restrictive agreement between 500 or more different owners owning 500 or more different and dissimilar parcels of real estate cannot be the subject matter of a class or representative suit, there being no common subject matter and no identity of interest among them. The case of Burke v. Kleiman in which one property owner was suing another property owner to the injury and detriment of the latter and where there was a dispute, conflict of interest and diversity of opinion as to the enforcement of the agreement was not a representative class suit, and the decree therein could not bind the privies or the petitioners herein who were not parties and not served with process of summons, on the theory of res judicata..... 32

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A. The decree enjoining Supreme Liberty Life Insurance Company, as mortgagee, and Harry H. Pace, sued as its president, was manifestly erroneous and so unreasonable and arbitrary as to deny these petitioners of their rights and property without due process of law, particularly in that the agreement sought to be enforced specifically exempted mortgagees from its operation... 35

B. The decree in Burke v. Kleiman could not be res judicata as to the petitioners and their privies not parties to nor served with process therein, because there was no existing class, it having been proved in the instant case that there was no agreement in fact among the property owners, and as a consequence the court did not have jurisdiction to bind any one, and especially not the petitioners and their privies who were not parties and not served with summons or process in said case, and said decree of Burke v. Kleiman was therefore void and could not be res judicata..... 36

II. The proceedings and the decree in the case of Burke v. Kleiman found by the trial chancellor to have been fraudulently and collusively brought and obtained upon the basis of a false stipulation of facts that the required frontage consent had been obtained, cannot be res judicata against anyone, and especially not against the petitioners and their privies who were not parties and were not served with summons or process in said suit and given a real opportunity to defend..... 37

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III. The enforcement, by the State courts by means of a mandatory injunction of a harsh, oppressive and discriminatory restrictive agreement among property owners wherein Negroes are prohibited from owning and occupying real estate solely on account of their race or color, deprives the petitioners of due process of law, the equal protection of the laws, and likewise abridges their privileges and immunities as citizens of the United States in violation of the 14th Amendment to the Federal Constitution, and is in further violation of Secs. 1977 and 1978 of Revised United States Statutes; such enforcement is contrary to the natural and inalienable rights of petitioners as citizens of the United States under the 14th Amendment 40

IV. The decree of the State courts which deprived the Hansberrys of their property without compensation was so arbitrary and contrary to law as to amount to a mere spoliation in violation of their rights to due process of law under the 14th Amendment to the Federal Constitution.. 43

V. The decree of the State courts enjoining Israel Katz, having been entered without any evidence whatsoever, is so plainly arbitrary and contrary to law, as to amount to mere spoliation of the petitioner Katz and as a consequence was an arbitrary and capricious judicial seizure of his property and a denial of his rights without due process of law in violation of the 14th Amendment to the Federal Constitution..... 43

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. _____

CARL A. HANSBERRY, NANNIE L. HANSBERRY, SUPREME LIBERTY LIFE INSURANCE COMPANY, a corporation, HARRY H. PACE, JAMES JOSEPH BURKE and ISRAEL KATZ,

Petitioners,

vs.

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, LOUISE G. ANDERSON, LYMAN M. ANDERSON and KATHRYN LUTTRELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, CARL A. HANSBERRY, NANNIE L. HANSBERRY, SUPREME LIBERTY LIFE INSURANCE COMPANY, HARRY H. PACE, JAMES JOSEPH BURKE and ISRAEL KATZ, respectfully pray for a writ of certiorari herein, to review a certain final decision of the Supreme Court of the State of Illinois, being the highest court of said State, in the above

entitled action, the opinion and decision of said court having been rendered and filed on October 10, 1939, and a petition for a re-hearing, also filed on the 4th day of November, A. D. 1939, being within the time allowed by the rules of the Supreme Court of Illinois, which said petition for re-hearing was, after being entertained and considered by the said Supreme Court of Illinois, denied on the 13th day of December, A. D. 1939, and this petition for certiorari, together with the certified transcript of record are herewith filed in this court, being within three months after denial of the petition for re-hearing by the Supreme Court of Illinois.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.

The respondents, Anna M. Lee, Edward L. Govanus, Esther Govanus, Louise G. Anderson, Lyman M. Anderson and Kathryn Luttrell (Plaintiffs below), brought an action in the Circuit Court of Cook County, for the purpose of enforcing a certain "restrictive agreement" purporting to involve 500 or more separate parcels of real estate owned by 500 or more owners in a certain section on the South Side of the City of Chicago. The area covered by the "restrictive agreement" consists of approximately 27 blocks and parts of blocks between 60th and 63rd Streets and between Cottage Grove and South Park Avenues in the City of Chicago, which said area is surrounded on the South by approximately 12,000 colored people (Rec. 251-252), on the North and West by approximately 50,000 colored people (Rec. 244, 252-253), on the North by Washington Park, used predominantly by colored people (Rec. 253), *and 125 colored families have lived within the area for periods of time ranging from*

hree to five years prior to the commencement of this action. (Rec. 82.) The area includes South Park Avenue, which runs through and adjacent to the heart of a South Side district in Chicago occupied by at least 150,000 colored people.

The substance of this agreement was that no part of the property purported to be restricted should be sold, leased to, or permitted to be occupied by any person of the colored race prior to January 1, 1948, or thereafter, unless said restrictive agreement should be abrogated by the owners of 75% of the frontage. The agreement contained the following provision:

> *"This agreement and the restrictions herein contained, shall be of no force or effect unless this agreement or a substantially similar agreement shall be signed by the owners above enumerated of 95% percentum of the frontage above described* or their heirs and assigns, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31, 1928."

The complaint as amended, alleged that the owners of 95% of the frontage signed the restrictive agreement, and that it was recorded February 1, 1928. It further alleged a conspiracy on the part of the defendants to destroy the agreement by selling or leasing property in the restricted area to Negroes. It charged particularly that there had been a conspiracy between the defendants, James J. Burke, Jay B. Crook, Harry H. Pace, The Supreme Liberty Life Insurance Company, a corporation, and the Hansberrys, to violate said restrictive agreement by the acquisition and purchase of the premises at 6140 Rhodes Avenue (Rec. 10-13), by the said Hansberry through the means of Jay B. Crook. The plaintiffs charged that the defendant, Israel Katz, had listed for sale his property at

6018 Vernon Avenue, with James J. Burke, a white real estate broker, and had made threats to sell his property to Negroes. (Rec. 17-18.)

The complaint further alleged that the several plaintiffs (respondents herein) were parties to and signers of the alleged restrictive agreement; that they were the several owners of certain properties in said area and further, that their real estate would be irreparably damaged by reason of the violation of the agreement.

The plaintiffs sought a temporary injunction which petitioners resisted by motions to strike the complaint and dismiss the suit (Rec. 22-28) and by oral argument in support thereof.

On July 8, 1937, Judge Michael Feinberg, to whom the cause was then referred, entered a temporary mandatory injunction over objections of petitioners, requiring the Hansberrys to move from the premises at 6140 Rhodes Avenue, and ordering also a writ of assistance to issue upon failure of said Hansberrys to move from said premises. (Rec. 28-32.) Said order of injunction likewise found that the Hansberrys were unlawfully in title to the aforesaid premises at 6140 Rhodes Avenue (Rec. 31), although said cause had not been heard upon the merits, and although said case was not at issue on the pleadings. The defendant Katz was likewise enjoined from selling or leasing his property to colored people. (Rec. 30.)

The defendants filed their several and respective sworn and verified answers (Rec. 32-48, 56-58, 78-91) categorically and specifically denying the allegations of the complaint as to the charges of conspiracy, and denied that the owners of 95% of the frontage described in the restrictive agreement had signed the agreement and asserted that the agreement never went into force or effect. The defend-

ants in their answers (Rec. 32-48, 56-58, 78-91) likewise set up several affirmative defenses contending that the alleged restrictive agreement was invalid and void, was an unlawful restraint on alienation, was also against the public policy of the State of Illinois and the United States of America, and that the enforcement of the restrictive agreement by the courts of the State of Illinois, would deprive the defendants of their liberty, their freedom of contract, their rights and their property without due process of law, and would likewise deprive the defendants of the equal protection of the law, and would abridge the privileges and immunities of the defendants as citizens of the United States of America, in violation of the 14th Amendment to the United States Constitution. (Rec. 32, 40-42, 47, 56, 86-88.)

The defendants in their several and respective answers (Rec. ..), likewise denied that the alleged restrictive agreement was a covenant running with the land, but asserted was a covenant against persons merely on account of their race and color. Defendants further denied that plaintiffs were bringing a representative suit, and stated that there had been such a change in the character of the neighborhood that it would be inequitable to enforce any such alleged agreement. The defendant, Katz, denied the execution and acknowledgment of the agreement and stated under oath that his signature to said alleged agreement had been obtained by fraud and trickery. (Rec. ...)

After the filing by the defendants of their several answers, motions to dissolve (Rec. 48-50, 58) were filed by them, together with affidavits (Rec. 50, 58) supporting denial of the execution of the agreement and compliance with conditions precedent contained in said agreement. To the defense that the agreement was never executed, plaintiffs replied that that question was *res judicata* (Rec.

60-61) having been determined in the case of *Burke* v. *Kleiman,* No. 567687, in the Superior Court of Cook County, Illinois. The chancellor, Judge George Bristow, reserved rulings on the motion to dissolve of the defendants and the plea of *res judicata* until a hearing on the merits. (Rec. 75-76.) The defendants filed additional pleadings called rejoinders (Rec. 72-75, 91-101), denying the rights of the plaintiffs to plead estoppel by verdict, or *res judicata* and denying that the case or decree of *Burke* v. *Kleiman* could be lawfully raised as estoppel by judgment or as *res judicata* and stating that the application of *res judicata* would deprive them of their rights and property without due process of law, in violation of the 14th Amendment to the Federal Constitution. *At the close of the evidence, the chancellor found that the owners of only about 54% of the frontage had signed the agreement, which agreement itself contained the condition precedent that it should be of no force or effect unless signed by the owners of 95% of the frontage,* but the chancellor in spite of his finding that the agreement was invalid by its own terms, and had never come into effect, nevertheless, "reluctantly" held the question of the execution and validity of the agreement was *res judicata* by virtue of the decree in *Burke* v. *Kleiman,* and further held *Burke* v. *Kleiman* to be a representative suit binding upon the petitioners in the instant case. (This case of *Burke* v. *Kleiman* was affirmed in 1934 by the Appellate Court of Illinois and reported in Vol. 277 at page 519, 189 N. E. 372.)

Notwithstanding the decree, the trial chancellor in his formal opinion (Rec. 266-269) rendered at the close of the case, used the following language: "In other words, there is an invalid agreement which is now sought to be enforced. And the answer that the plaintiffs make to that

contention is not to try to show that it was properly signed by the requisite number of property owners, but that its validity has already been sustained by several courts. * * * We have a man named Burke, whose personality and activity enter into the picture. It is urged, and I think with a good deal of merit, that the lawsuit (*Burke* v. *Kleiman*) which he brought to test out the validity of the agreement was more or less a dummy proceeding, of which can be easily seen that although it appears on the face of which to be representative and class in its character, still it (*Burke* v. *Kleiman*) was conceived by him and prosecuted by him for the sole purpose of establishing the integrity and invulnerability of the district that is under the covenant; in other words, to make it unassailable. * * * And he in effect, says through himself and through those he was working with to bring about the destruction of this agreement, he says in effect that, lawsuit (*Burke* v. *Kleiman*) that I brought was a fraud, and I had no authority to represent the class, and I was not representing the class. It was my own personal lawsuit. I obtained the stipulation of the facts that the agreement contained the signatures of more than 95% of the frontage, and that was all a fraud; *and we know it was a fraud because the proof now shows that there wasn't 95%. * * * He committed a fraud when he brought this lawsuit.* (*Burke* v. *Kleiman.*)

The following are the material and pertinent facts in respect to the proceedings and the decree of *Burke* v. *Kleiman* (Rec. 312-354) pleaded by respondents as *res judicata:*

In October, 1932, Olive Ida Burke (wife of James J. Burke, one of the petitioners herein), owning a parcel of property at 6039 Vernon Avenue, Chicago, filed a suit in equity (Rec. 312), purportedly on her own behalf and

on behalf of all other property owners adversely affected by violation of the agreement thereinafter mentioned) against Isaac Kleiman, owner of the premises at 417 East 60th Street, Chicago, Illinois (not the property in the instant case), Samuel Kleiman, owner of a mortgage note on said premises, Charles Sopkins, Trustee for the benefit of the owner of the mortgage note, and James Lowell Hall, a Negro tenant in said building, to enforce specifically by injunction, the same agreement sought to be enforced in the instant case.

No testimony was taken or proof adduced showing that the required frontage consent of 95% had ever been obtained, but a stipulation was signed by the attorney for Olive Ida Burke and by Charles J. Sopkins, an attorney who purported to act for himself and the other defendants. (Rec. 65, 339-349.) *It was stipulated by the attorneys merely, that 95% of the owners of the property in said restricted area had signed, sealed and acknowledged said agreement* (not the owners of 95% of frontage as required on the agreement) and that it was in full force and effect. (Rec. 65, 339.) A decree was entered in October, 1933, declaring said restrictive agreement to be in full force and effect and that it was a covenant running with the land and binding upon the defendants in that suit (Rec. 338-353), *but the Court did not find that it was a representative suit.*

There were no other property owners or signers made parties defendant in the case of Burke v. *Kleiman.* The only property owners being Olive Ida Burke and Isaac Kleiman. *The only property involved was the property of Isaac Kleiman at 417 East 60th Street,* which was the only parcel over which the court had jurisdiction. Neither the petitioners nor any of their grantors were made parties to the proceeding of *Burke* v. *Kleiman.* There was

no notice by publication or otherwise given to any of the other 500 or more property owners or signatories to the said alleged restrictive agreement. The case was merely one where one property owner, not a signer of the restrictive agreement, was suing other property owner, not a signer of the agreement, to enforce the restrictive agreement.

Burke, former President of the Woodlawn Property Owners Association which filed the *Burke* v. *Kleiman* case charged in his answer (Rec. 44-46) that the invalidity of the agreement was known to the Association at the time the several suits were conducted by it to enforce the agreement, which allegations were never rebutted by the plaintiffs in the instant suit.

In the *Burke* v. *Kleiman* case, the execution and validity of the agreement were not put in issue by the answers (Rec. 330-337) of the several defendants therein but their answers were confined to the sole unsubstantial and frivolous defense that violations in respect to 3 or 4 parcels included in an agreement covering 500 or more parcels constituted a change in the character of the neighborhood so as to make it inequitable to enforce the covenant. (Rec. 330-337.)

In the instant case, Isaac Kleiman and James Lowell Hall, parties defendant in the case of *Burke* v. *Kleiman*, both appeared and testified that they had not employed or authorized any lawyer to represent them in the case of *Burke* v. *Kleiman*, nor did they have any knowledge of any stipulation of facts, nor had they authorized its signing. (Rec. 237-238.) The chancellor in the instant case, after competent proof, found that the stipulation was a false stipulation, and that the case and proceedings of *Burke* v. *Kleiman* were collusive and fraudulent, and

that the whole case was tainted with fraud. (Rec. 267-268.) The affidavit (Rec. 283-286) executed by Fred L. Helman, the individual who attempted to create the restrictive agreement, shows that as early as *February 1, 1929, which was three and a half years prior to the filing of the suit of Burke* v. *Kleiman, it was known by the Woodlawn Property Owners Association and its officials of which said Fred L. Helman was the Executive Secretary, that the alleged restrictive agreement was invalid according to its own terms, because the required frontage consent had not obtained.* (Rec. 284-286.) The record shows that the same Fred L. Helman, as Notary Public, took the acknowledgment of Olive Ida Burke to the complaint in the case of *Burke* v. *Kleiman.* (Rec. 329.) Helman's affidavit (Rec. 284-286) shows that it was known, at the time of the filing of said suit (October, 1932) by him and other officials of the Woodlawn Property Owners Association, that said restrictive agreement was invalid and had never come into force and effect according to its own terms, and that this knowledge was acquired three and a half years prior thereto.

Helman's affidavit (Rec. 286) likewise shows that he conferred with various officials of the Woodlawn Property Owners Association in regard to the filing of said case of *Burke* v. *Kleiman,* and that he directed or caused to be paid to the attorneys representing Olive Ida Burke, the court costs for the filing of said case, and that he generally supervised the prosecution of said case up to year 1933 when he severed his connection. (Rec. 286.)

The decree in *Burke* v. *Kleiman* makes no mention of any representative or class suit. (Rec. 338-353.) Nor does the Appellate Court on Appeal make any reference to its being a representative or class suit. (277 Ill. App. 519, 189 N. E. 372.)

In spite of the finding that the case and proceedings in *Burke* v. *Kleiman* were tainted with fraud and collusion, Chancellor Bristow, nevertheless reluctantly sustained the plaintiffs' plea of *res judicata* (Rec. 119) and thereupon in his decree (Rec. 102-125) sustained the objections of the plaintiffs to the defendants' answers (Rec. 122) and proceeded to declare the conveyance to the Hansberrys, void, and directed that upon the failure of the Hansberrys to convey their property to a white person, that a Master in Chancery of the court convey the same to Jay B. Crook, but *said decree* (Rec. 123) *in no manner whatsoever provided for compensation to the Hansberrys.* The chancellor enjoined Burke from selling or leasing any real estate within the alleged restrictive area to Negroes or to white persons for the purpose of selling or leasing to Negroes; enjoined Katz from selling or leasing his building at 6018 Vernon Avenue to Negroes; enjoined Pace and the Supreme Liberty Life Insurance Company from making any further loans on the real estate in the restricted area.

Inasmuch as a free hold was involved, the petitioners appealed directly to the Supreme Court of Illinois, being the highest court of the State.

II.

JURISDICTIONAL STATEMENT.

1. The jurisdiction of this court is based upon Section 237b of the Judicial Code as amended by the Act of January 13, 1925; Volume 8, Fed. Code Annotated (FCA), Title 28. Judicial Code, Section 344b.

The Supreme Court of Illinois, on October 10, 1939, by *a divided court,* affirmed the judgment or decree of

the Circuit Court of Cook County, Illinois, in favor of the respondents herein and against the petitioners. (Volume 372 Ill., page 369, 24 N. E. (2d) 37.) Petition for rehearing was later filed by petitioners within the time allowed by the rules of the Supreme Court of Illinois on the 4th day of November, 1939 (Rec. 475), and afterwards was denied on December 13, 1939, and this petition for certiorari is now filed within three months after the denial of the petition for rehearing in the Supreme Court of Illinois.

The affirmance of the decree of the trial court in its wrongful application of the doctrine of *res judicata* denied the petitioners notice and a real opportunity to appear, to be heard, and to defend, and violated the petitioners' rights to due process of law under the 14th Amendment to the Federal Constitution under which Amendment the petitioners specially set up and claimed certain rights, titles, privileges and immunities. See *Postal Cable Telegraph Co.* v. *Newport,* 247 U. S. 464 at 475; 38 S. Ct. 566, 62 L. Ed. 1215; *Wabash Railway Co.* v. *Adelbert College,* 208 U. S. 38 at 57-58 and 59, 28 S. Ct. 182, 52 L. Ed. 379; *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662 at 671; *Smith* v. *Swormstedt,* 16 Howard 288 at 303; *Hamer* v. *New York Railways Co.,* 244 U. S. 266 at 273; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 at 682; *Scott* v. *Donald,* 165 U. S. 107 at 115 to 117; *Pennoyer* v. *Neff,* 95 U. S. 714 at 733; *Scott* v. *McNeal,* 154 U. S. 34 at 45 and 46; *Williams* v. *Gibbes,* 17 Howard 239 at 254, 257; *Simon* v. *Craft,* 182 U. S. 437; *Ward* v. *Board of County Commissioners,* 253 U. S. 17 at 22; *Chase National Bank* v. *Norwalk,* 291, 431 at 438; *Windsor* v. *McVeigh,* 93 U. S. 274 at 277; *Earle* v. *McVeigh,* 91 U. S. 503.

The affirmance of the decree of the trial court necessarily deprived the Hansberrys of their rights and property without due process of law in violation of the 14th Amendment to the Federal Constitution because no compensation was provided for them in or by said decree thereby amounting to a spoliation and said Hansberrys specially set up and claimed rights, privileges, titles and immunities as citizens of the United States of America under Section One of the 14th Amendment to the Federal Constitution which was thereby drawn in question; and moreover the said Hansberrys, petitioners, were denied due process of law and the equal protection of the laws, and their rights, privileges, and immunities as citizens of the United States were abridged. See Delmar Jockey Club in Missouri, 210 U. S. 324 at 335.

The petitioners set up and claimed specially under the 14th Amendment to the Federal Constitution certain rights, titles, privileges and immunities which they asserted were denied and abridged by the enforcement, by the State's Judicial officers and courts, of a harsh, oppressive and discriminatory property owner's covenant, and the 14th Amendment to the Federal Constitution was thereby necessarily drawn in question by the decree and judgment of the Illinois Supreme Court in sustaining the lower court's decree. See *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226 at 233-35; *Home Telegraph, etc.* v. *Los Angeles,* 227 U. S. 278; *Ex parte Virginia,* 100 U. S. 339; *Strauder* v. *West Virginia,* 100 U. S. 303; *Carter* v. *Texas,* 177 U. S. 442; *Colgate* v. *Harvey,* 296 U. S. 404, at 430-433.

The petitioners' rights to due process of law were denied and abridged by the affirmance of the decree of the trial court which reluctantly held that *Burke* v. *Klei-*

man, though a fraudulent and collusive suit, was *res judicata* and therefore binding upon the petitioners in the instant case. See *Lord* v. *Veazie,* 8 Howard 251 at 255; *Michaels* v. *Post,* 21 Wall. 298; *Beale* v. *Ill. M. & T. R. Co.,* 133 U. S. 290; *Riehle* v. *Margolies,* 279 U. S. 219.

The rights of the petitioner Katz to due process of law were denied and abridged in that the decree enjoined said Katz without any evidence whatsoever in support of said injunction so that said decree amounted to an arbitrary and capricious judicial seizure of Katz' property. See *Delmar Jockey Club* v. *Missouri,* 210 U. S. 324 at 335; *Norris* v. *Alabama,* 294 U. S. 578 at 590; *Creswill* v. *Knights of Pythias,* 225 U. S. 246 at 261; *Truax* v. *Corrigan,* 257 U. S. 312 at 324-5.

The petitioners' rights to due process of law were denied and abridged in that the decree of *Burke* v. *Kleiman,* a void judgment, or decree was pleaded and sustained as *res judicata* against them. The decree in the instant case found that *Burke* v. *Kleiman* was a class suit and therefore binding upon the petitioners herein, although no class in fact ever existed, as shown by the finding of the trial chancellor both in his oral opinion and decree that the agreement sought to be specifically enforced was executed by 54% of the frontage instead of 95%, as required by its own terms. The court in *Burke* v. *Kleiman* lacked jurisdiction of the parties and the subject matter because the agreement sought to be enforced had never become operative by its own terms. See *Christopher* v. *Brussellback,* 302 U. S. 500; *Old Wayne Life Ass'n of Ind.* v. *McDonough,* 204 U. S. 8 at 15-17, 23; *Scott* v. *McNeal,* 154 U. S. 34 at 45, 46.

The petitioners raised the Federal questions sought

to be reviewed by filing their several and respective motions to strike and dismiss the respondents' suit, in which they contended that the enforcement of the restrictive agreement violated the 14th Amendment and Sections 1977 and 1978 of the Revised Statutes and was contrary to the aims, purposes and objects as expressed in the Federal Constitution. (Rec. 22-28.) The trial court overruled the petitioners' several and respective motions to strike and dismiss. (Rec. 29.)

The petitioners then filed their several and respective answers, setting up the same Federal questions. (Rec. 32-47, 56-58, 78-91.) The petitioners likewise filed their several and respective motions to dissolve (Rec. 48-50), again asserting the Federal questions sought to be reviewed here. To the defendants' plea of *res judicata* raised in their reply, the defendants filed their several and respective rejoinders to said reply, denying that they had been estopped upon the basis of said decree of *Burke* v. *Kleiman*, and further asserted that the sustaining of a plea of *res judicata* and any estoppel against them would deny them of due process of law and the equal protection of the laws in violation of the 14th Amendment. (Rec. 72-75, 91-101.)

The trial chancellor in his decree (Rec. 102-125), sustained the plea of *res judicata* in the reply and sustained the objections to the defendants' answers in which they had asserted the Federal Constitutional questions above set up. (Rec. 119, 121-122.)

Upon the trial of the cause the defendants objected to the introduction of Plaintiffs' Exhibit No. 5 (Rec. 197-201, 451-461) (which was the alleged restrictive agreement), on the Federal grounds above asserted. The trial court overruled said objections and allowed the introduction of the said restrictive agreement in evidence against

the petitioners. (Rec. 200-201.) The trial court in its decree found that the enforcement of the restrictive agreement did not violate any article of the Constitution of the United States and is not unconstitutional; that it was not against public welfare; that it did not deprive the petitioners of any of their equal or civil rights nor did it deprive the petitioners or Negroes as a class, of due process of law under the Federal Constitution, and then proceeded to sustain the plea of *res judicata* as well as the objections of the plaintiffs to the answer of the petitioners. (Rec. 121-122.)

The petitioners again raised the above mentioned Federal Constitutional questions in their appeal to the Supreme Court of Illinois, and as provided in the rules of the Supreme Court of Illinois, assigned these errors in a portion of their brief entitled "Errors relied upon for reversal". The petition for rehearing in the Supreme Court of Illinois, raised the same Federal Constitutional question.

The affirmance by the Supreme Court of Illinois, of the decree of the trial chancellor who had ruled adversely on the Federal Constitutional questions raised by the petitioners, necessarily involved substantial Federal questions, the disposition of which were necessary to a determination of the case.

III.

QUESTIONS PRESENTED.

1. Assuming that there is a property owners' agreement among 500 or more different property owners owning 500 or more different and dissimilar parcels of real estate whereby the sale and leasing of real estate to

Negroes is prohibited solely on account of their race or color, and assuming also *that one property owner sues another property owner for specific performance of said restrictive agreement in respect to one parcel of property,* and said suit shows on its face that there is a dispute, conflict of interest, and diversity of opinion in respect to its enforcement, can such a suit, wherein one property owner sues another to the injury and detriment of the latter, be a class or representative action so that the decree in the first suit will thereafter in a second suit between still different property owners, estop, bind and conclude persons and their privies, not parties to or served with summons or process, on the theory of *res judicata?*

(a) Where a decree finds a property owners' covenant to be in full force and effect on the basis of a false stipulation of facts, and in a second suit involving the same property owners' covenant, it is proved beyond any question of doubt that such covenant never came into being or force or effect and was invalid according to its own terms because the required frontage consent had never in fact been obtained, can such a decree be *res judicata* on the theory that the first action was a representative or class suit, when in truth and in fact no class ever existed, there being no covenant in fact? And did the court in said first suit ever have jurisdiction to bind any person, especially persons and their privies not parties and not served with summons and process?

2. Whether the proceedings, suit and decree in the case of *Burke* v. *Kleiman* found by the trial chancellor in the instant case to have been collusively and fraudulently brought and obtained may be pleaded as *res judicata.*

3. Whether the enforcement, by the State courts, by means of a mandatory injunction, of a harsh, oppressive and discriminatory restrictive agreement among property owners wherein Negroes are prohibited from owning and occupying real estate solely on account of their race or color, deprives the petitioners of due process of law, the equal protection of the laws, and likewise abridges their privileges and immunities as citizens of the United States in violation of the 14th Amendment to the Federal Constitution, and is in further violation of Secs. 1977 and 1978 of Revised United States Statutes; and whether such enforcement is contrary to the natural and inalienable rights of petitioners as citizens of the United States under the 14th Amendment.

4. Whether the decree which directed the Hansberrys to convey their three-apartment building at 6140 Rhodes Avenue to a white person within thirty days, and upon failure so to do, directed a Master in Chancery of said court to convey the same to Jay B. Crook, a white person, without providing for compensation to said Hansberrys (and said decree being actually executed by said Master in Chancery), is so plainly arbitrary, contrary to law and capricious as to amount to a mere spoliation of said petitioners and the taking of their property without due process of law in violation of the 14th Amendment to the United States Constitution.

5. Whether the decree enjoining Israel Katz, which was entered without any evidence whatsoever, is so plainly arbitrary and contrary to law, as to amount to a mere spoliation of the petitioner Katz, and a capricious and arbitrary judicial seizure of his property and a denial of his rights without due process of law in violation of the 14th Amendment to the Federal Constitution.

6. Whether the decree in enjoining Supreme Liberty Life Insurance Company, mortgagee, and Harry H. Pace, sued as its president, from making mortgage loans in said restricted area, although the agreement sought to be enforced expressly exempted mortgages from its operation, is so plainly arbitrary, unreasonable and contrary to law as to amount to a spoliation of the petitioners, Supreme Liberty Life Insurance Company and Harry H. Pace, its president, and a deprivation of their rights and property without due process of law in violation of the 14th Amendment to the United States Constitution.

IV.

REASONS RELIED FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

1. The decision of the Supreme Court of Illinois in affirming the decree of the court below, is probably not in accord with the following applicable decision of this Court:

Wabash Railway Co. v. *Adelbert College,* 208 U. S. 38 at 57, 59.

Hartford Life Ins. Co. v. *Ibs,* 237 U. S. 662 at 617.

Hamer v. *New York Railways Co.,* 244 U. S. 266 at 273.

Christopher v. *Brusselback,* 302 U. S. 500.

Smith v. *Swormstedt,* 16 Howard 288 at 303.

Scott v. *Donald,* 165 U. S. 107, at 115-117.

Postal Telegraph Cable Co. v. *Newport,* 247 U. S. 464 at 475.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill,* 281 U. S. 673 at 682.

Matthews v. *Rodgers,* 284 U. S. 521 at 529-30.

Williams v. *Gibbs,* 17 Howard 239 at 254-7.

Boswell v. *Otis*, 9 Howard 336 at 348.
Scott v. *McNeal*, 154 U. S. 34 at 45, 46.
Pennoyer v. *Neff*, 95 U. S. 714 at 727, 733.

The decision of the Supreme Court of Illinois in holding that the property owners agreement among 500 or more different property owners owning 500 or more different and dissimilar parcels of property was a proper subject matter of a representative or class action is not in accord with the decision of this court in *Wabash Railway Co.* v. *Adelbert College, supra; Hartford Life Ins. Co.* v. *Ibs; Hamer* v. *New York Railways Co. supra, which hold that there must be some common subject matter and identical interest, and that in order to have a class suit, some member of the class must be suing or defending on behalf of all the members of the class, and further, that one member of a class cannot sue those whom he purports to represent in a class suit.* The decision of the Supreme Court of Illinois in sustaining a plea of *res judicata* against the petitioners is not in accord with the decision of this court in *Postal Telegraph Cable Co.* v. *Newport, supra*, which holds that the doctrine of *res judicata* cannot be invoked against persons and their privies who have not been served with process or summons and who have not had their day in court and a real opportunity to defend.

(a) In holding *Burke* v. *Kleiman* to be a representative suit or class action and the decree therein to be *res judicata* against petitioners when in truth and in fact there was no valid agreement according to its own terms, the Supreme Court of Illinois decided the case in a way not in accord with the decision of this court:

See:

Matthews v. *Rodgers, supra.*
Christopher v. *Brusselback*, 302 U. S. 500, 58 Sct. 350.

Scott v. *McNeal, supra, Hovey* v. *Elliot,* 167 U. S. 409, 17 Sct. 841.

Simon v. *Southern Ry. Co.,* 236 U. S. 115 at 122, 132.

Old Wayne Mutual Life Ass'n of Ind. v. *McDonough,* 204 U. S. 8 at 15-17, 23.

There was no jurisdiction to bind the petitioners and their privies not parties and not served with process, and there being no agreement and therefore, no class, the decree in *Burke* v. *Kleiman* was therefore void.

See:

Christopher v. *Brusselback,* 302 U. S. 500.

Matthew v. *Rodgers, supra.*

Scott v. *Donald,* 165 U. S. 115-117.

Scott v. *McNeal, supra.*

Hovey v. *Elliot, supra.*

Simons v. *Southern Ry. Co., supra.*

Old Wayne Mutual Life Ass'n of Ind. v. *McDonough,* 204 U. S. 8 at 15-17, 23.

2. The decision of the Supreme Court of Illinois in sustaining a plea of *res adjudicata* based on the fraudulent decree of *Burke* v. *Kleiman* is not in accord with the applicable decisions of this court:

See:

Lord v. *Veazie,* 8 Howard 251 at 255.

Michaels v. *Post,* 21 Wall. 398,

which hold that a fraudulent and collusive decree and judgment may be attacked collaterally.

See:

Beals v. *Ill. M. & T. R. Co.,* 133 U. S. 290.

Riehle v. *Margolies,* 279 U. S. 218.

3. In enforcing the restrictive agreement the State court and State judicial officers have deprived the petitioners of their rights and property without due process

of law, and abridged their privileges and immunities as well as denied them the equal protection of the laws in violation of the 14th Amendment in a manner probably not in accord with the applicable decisions of this court in the following cases:

Chicago Burlington & Quincy R. Co. v. *Chicago,* 166 U. S. 226 at 233-235.

Home Telegraph Etc. v. *Los Angeles,* 227 U. S. 278.

Ex parte Virginia, 100 U. S. 339.

Strauder v. *West Virginia,* 100 U. S. 303.

Neal v. *Delaware,* 103 U. S. 370.

Carter v. *Texas,* 177 U. S. 442.

In enforcing the harsh, oppressive and discriminatory restrictive agreement, the Supreme Court of Illinois abridged the privileges and immunities of petitioners as citizens of the United States in violation of the 14th Amendment and Sections 1977 and 1978 in a manner not in accord with the applicable decision of *Colgate* v. *Harvey,* 296 U. S. 404 at 430-433, wherein the Supreme Court of the United States held that citizens of the United States by virtue of their National Citizenship derived under the 14th Amendment have the privilege and immunity of buying, selling and contracting for property without discrimination.

4. In affirming the decree which took the Hansberry's property without compensation, the Supreme Court of Illinois probably decided the case in a manner not in accord with an applicable decision of this court: *Delmar Jockey Club* v. *Missouri,* 210 U. S. 324 at 335, in which the court held that a decree which is so arbitrary and so contrary to law as to amount to a spoliation, deprives a litigant of his property without due process of law in violation of the 14th Amendment.

5. In affirming the decree enjoining Katz, the Supreme Court of Illinois decided the case in a manner not in accord with the case of *Delmar Jockey Club* v. *Missouri, supra,* and probably not in accord with the cases of *Norris* v. *Alabama,* 294 U. S. 578; *Creswell* v. *Knights of Pythias,* 225 U. S. 246 at 261; *Truax* v. *Corrigan,* 257 U. S. 312, 324-5, which hold that where findings of fact are made without any evidence whatsoever to support them the Federal right has nevertheless been denied and this court must examine the facts to determine whether the Federal right has been denied.

6. In deciding that the enforcement of the harsh, oppressive and discriminatory restrictive agreement is not against the general welfare of the Nation and not contrary to the aims, purposes and objects of the Federal Government, the Supreme Court of Illinois has decided a Federal question of substance not heretofore decided by this court. See *Colgate* v. *Harvey,* 296 U. S. 404.

7. In affirming the decree enjoining Supreme Liberty Life Insurance Company, mortgagee, and Harry H. Pace, sued as its president, from making mortgage loans in said restricted area, the Supreme Court of Illinois denied the case in a manner not in accord with the case of *Delmar Jockey Club* v. *Missouri, supra,* in that the said decree as to these petitioners was so contrary to law and so manifestly unreasonable and arbitrary as to amount to a spoliation in that it prevented them from making mortgage loans in said area and obtaining earnings from mortgage investments, although the agreement itself expressly exempted mortgagees from its operation.

8. In deciding that a property owner's restrictive agreement may be the subject matter of a class or representa-

tive suit, which may be used as *res judicata* against persons not parties or privies and not served with summons or process, the Supreme Court of Illinois has decided a Federal question of substance not yet decided by this court. The necessary effect of the decision of the Supreme Court of Illinois will be to unsettle and to cloud a great part of the land titles in Illinois and many states of the Union. Collusive and fraudulent suits will be encouraged and all of the ancient rights of due process will be destroyed by the resort to the technical doctrine of *res judicata* which will foreclose every one of his right and opportunity to be heard. See *Lord* v. *Veazie,* 8 Howard, 251 at 255; *Geter* v. *Hewitt,* 22 Howard 364. If the decision is allowed to stand, no person, black or white, will be safe in his person, property or his rights. If class suits can be maintained in respect to property owners' covenants involving many parcels of property, then some property owners will thus be enabled to destroy the property rights of others while thus purporting to represent them in the class suit and while they are not parties and are without an opportunity to defend.

This court has not yet decided whether the right to own and hold property is a natural and inalienable right, privilege and immunity of a citizen of the United States by virtue of National citizenship and a right which may not be abridged and denied by the judicial recognition and judicial action of the State Courts in enforcing discriminatory agreements which would deny the natural and inalienable right of a citizen to own and hold property.

WHEREFORE, it is respectfully submitted that this peti-

tion for certiorari to review the judgment and decree of the Supreme Court of Illinois, should be granted.

CARL A. HANSBERRY,
NANNIE L. HANSBERRY,
SUPREME LIBERTY LIFE INSURANCE COMPANY,
HARRY H. PACE,
JAMES J. BURKE,
ISRAEL KATZ.

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Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Opinion of Court Below.

(Majority and Dissenting Opinion.)

The opinion of the Supreme Court of Illinois is reported in 372 Ill., page 369, of the Illinois Reports, and also in 24 N. E. 2nd, page 37, as well as in the record filed in this cause. (Rec. 464, 469.)

JURISDICTION.

1. The jurisdiction of this court is based upon judicial code Section 237b as amended by the Act of February 13, 1925. Federal Code Annotated, Title 28, Vol. 8, page 44, Section 344b.

2. The original date of the judgment or decree to be reversed, is October 10th, 1939. (Rec. . .) Petition for rehearing was filed November 4th, 1939, within the time provided by the rules of the Supreme Court of Illinois, and the petition for rehearing was denied December 13, 1939. (Rec. . .)

3. The 14th Amendment to the Constitution of the United States, Sections 1977 and 1978 of the Revised United States Statutes, and the Preamble and the Bill of Rights to the Federal Constitution were drawn in question by the petitioners who specially set up and claimed rights, privileges and immunities thereunder, which were denied by the courts below in various rulings.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in the accompanying petition for certiorari, which also contains a full statement of the questions presented, and in the interest of brevity are not repeated here. Any necessary elaborations on the evidence on the points involved will be made in the course of argument which follows.

SPECIFICATIONS OF ERRORS.

The Supreme Court of Illinois erred:

1. In affirming the decree of the Circuit Court of Cook County, Illinois, which found the case of *Burke* v. *Kleiman* to be a representative or class action, and in sustaining said decree as *res judicata* against the petitioners in the instant case.

(a) In affirming the decree of the Circuit Court of Cook County, Illinois, which found that *Burke* v. *Kleiman* was a class suit, although it found also that there never was a valid agreement and never in fact any class, and as a consequence, erred in sustaining the plea of *res judicata* on the basis of the decree of *Burke* v. *Kleiman.*

(b) And erred in not finding that the decree of *Burke* v. *Kleiman* was fraudulent, void, and entered without jurisdiction to bind any of the parties thereto or the petitioners.

2. In sustaining the plea of *res judicata* upon the basis of a decree and proceedings fraudulently and collusively brought and obtained.

3. In enforcing the harsh, oppressive and discriminatory restrictive agreement in deprivation of the petitioners' rights and property without due process of law,

thereby denying the equal protection of the laws and abridging their privileges and immunities in violation of the 14th Amendment to the United States Constitution.

4. In enforcing the restrictive agreement against the petitioners in violation of Section 1977 and 1978 of the Revised United States Statutes.

5. In affirming the decree which deprived the Hansberrys of their property without compensation, in violation of their rights to due process of law under the 14th Amendment to the Federal Constitution.

6. In affirming the decree enjoining Israel Katz in an arbitrary and capricious manner, and without any evidence whatsoever, in deprivation of his rights and property without due process of law in violation of the 14th Amendment to the Federal Constitution.

7. In affirming the decree which enforced a harsh, oppressive and discriminatory restrictive agreement, which is against the public policy of the United States as expressed in Sections 1977 and 1978 of the Revised United States Statutes, the Federal Bill of Rights and the 14th Amendment, and which is likewise contrary to the natural and inalienable rights of the petitioners as citizens of the United States, contrary to the general welfare, and contrary to the aims, purposes and objects and the Federal Constitution as expressed in its preamble to the 14th Amendment.

8. In affirming the decree enjoining Supreme Liberty Life Insurance Company, mortgagee and Harry H. Pace, sued as its president from making mortgage loans in said restricted area, although the agreement sought to be enforced expressly exempts mortgagees from its operation.

SUMMARY OF THE ARGUMENT.

I. A property owner's restrictive agreement between 500 or more different owners owning 500 or more different and dissimilar parcels of real estate cannot be the subject matter of a class or representative suit, there being no common subject matter and no identity of interest among them. The case of *Burke* v. *Kleiman* in which one property owner was suing another property owner to the injury and detriment of the latter and where there was a dispute, conflict of interest and diversity of opinion as to the enforcement of the agreement was not a representative or class suit, and the decree therein could not bind the privies or the petitioners herein who were not parties and not served with process or summons, on the theory of *res judicata.*

A. The decree enjoining Supreme Liberty Life Insurance Company, as mortgagee and Harry H. Pace, sued as its president was manifestly erroneous and so unreasonable and arbitrary as to deny these petitioners of their rights and property without due process of law, particularly in that the agreement sought to be enforced specifically exempted mortgagees from its operation.

B. The decree in *Burke* v. *Kleiman* could not be *res judicata* as to petitioners and their privies not parties to nor served with process therein, because there was no existing class, it having been proved in the instant case that there was no agreement in fact among the property owners, and as a consequence the court did not have jurisdiction to bind any one, and especially not the petitioners

and their privies who were not parties and not served with summons or process in said case, and said decree of *Burke* v. *Kleiman* was therefore void and could not be *res judicata.*

II. The proceedings and the decree in the case of *Burke* v. *Kleiman* found by the trial chancellor to have been fraudulently and collusively brought and obtained upon the basis of a false stipulation of facts that the required frontage consent had been obtained, cannot be *res judicata* against any one, and especially not against the petitioners and their privies who were not parties and were not served with summons or process in said suit and given a real opportunity to defend.

III. The enforcement, by the State courts by means of a mandatory injunction of a harsh, oppressive and discriminatory restrictive agreement among property owners wherein Negroes are prohibited from owning and occupying real estate solely on account of their race or color, deprives the petitioners of due process of law, the equal protection of the laws, and likewise abridges their privileges and immunities as citizens of the United States in violation of the 14th Amendment to the Federal Constitution, and is in further violation of Secs. 1977 and 1978 of Revised United States Statutes; such enforcement is contrary to the natural and inalienable rights of petitioners as citizens of the United States under the 14th Amendment.

IV. The decree of the State Courts which deprived the Hansberrys of their property without compensation was so arbitrary and contrary to law as to amount to a mere spoliation in violation of their rights to due process of law under the 14th Amendment to the Federal Constitution.

V. The decree of the State Courts enjoining Israel Katz, having been entered without any evidence whatsoever, is so plainly arbitrary and contrary to law, as to amount to a mere spoliation of the petitioner Katz and as a consequence was an arbitrary and capricious judicial seizure of his property and a denial of his rights without due process of law in violation of the 14th Amendment to the Federal Constitution.

ARGUMENT.

I. A property owner's restrictive agreement between 500 or more different owners owning 500 or more different and dissimilar parcels of real estate cannot be the subject matter of a class or representative suit, for there must be a common subject matter or identical interest among all the members of the class. See *Smith* v. *Swormstedt*, 16 Howard 288 at 303; *Wabash Railway Company* v. *Adelbert College*, 208 U. S. 38 at 57-59; *Hartford Life Ins. Co.* v. *Ibs.*, 237 U. S. 662 at 671; *Christopher* v. *Brusselback*, 302 U. S. 500 at 505. The plaintiff who brings a class suit must sue or defend for the benefit of *all*. A mere common interest in the *question* involved is not enough upon which to base a representative or class suit. See:

Story, 6th Ed., Sec. 97, p. 109.
Moore's Federal Practice, Vol. 2, p. 2236.
Hale v. *Hale*, 146 Ill. 227, 258.
Weberpals v. *Jenny*, 300 Ill. 156.

Nor is mere numerousness of parties sufficient for the bringing of a class or representative action. See *Matthews* v. *Rodgers*, 284 U. S. 521 at 529-30.

The proceedings and decree in the case of *Burke* v. *Kleiman* pleaded as *res judicata* was a situation where one property owner was suing another property owner to the detriment and injury of the latter to enforce the terms of an alleged restrictive agreement to which the grantors of both were purportedly parties signatory. In other words, the plaintiff, Burke, was not representing the defendant, Kleiman, in respect to any common subject matter for the benefit of all involved, but on the contrary, was engaged in a supposed dispute involving a different and diversity of interest and conflict of interest

between the plaintiff Burke and the defendant, Kleiman on the matter of leasing the one parcel of property involved, owned by the Kleimans, to Negroes or colored people. (Rec. 312-337.) There was no common subject matter, but apparently a sharp conflict of interest and opinion in respect to the enforcement of the restrictive agreement by the plaintiff Burke and against the defendant Kleiman. Consequently, the case of *Burke* v. *Kleiman* could not possibly be a representative or class action, and since neither the petitioners nor any of their grantors were parties to that action, nor served with summons or process, the decree of *Burke* v. *Kleiman* could not in the absence of the petitioners or their grantors bind, conclude and estop the petitioners or their grantors as *res judicata;* and both the trial court and the Supreme Court of Illinois erred in finding that decree binding thereby depriving petitioners of their rights and property without due process of law in violation of the 14th Amendment.

A property owner's restrictive covenant, which involves 500 or more different owners owning dissimilar parcels of real estate, all of which are differently situated, some with mortgages upon them, and some free and clear of encumbrances, some heavily burdened by taxes, and some not, some large, and some small, some homes and residences and some apartment buildings and commercial properties, some owned by private individuals and others by banks and insurance companies, some close to and adjacent to colored people and some far away, some owned by minors, guardians or trustees, some owned by hotels or inns under a statutory duty imposed by the Civil Rights Act of the State of Illinois to admit all persons without regard to race or color, some owned by hospitals under a like statutory duty to admit all persons, some wishing to enforce the agreement and others not, inherently cannot be the subject matter of a representative

or class action, because there can be no common or identical interest between the property owners, and because instead of one common subject matter, there are 500 or more different subject matters, namely: 500 or more parcels of property. In the instant case, the Supreme Court of Illinois has affirmed a decree which held a suit to be representative where the plaintiff Burke was suing another member of a class whom the plaintiff purported to represent. An allegation in a complaint, that a plaintiff brings the action on behalf of himself and all others similarly situated, does not in itself make an action a class suit. See *Wabash Railway Co.* v. *Adelbert College,* 208 U. S. 38 at 57-59; *Hamer* v. *New York Railways Co.,* 244 U. S. 266 at 273.

In sustaining the plea of *res judicata* against the petitioners, when neither they nor their grantors were parties to the proceedings of *Burke* v. *Kleiman,* the courts below thereby denied the petitioners the right to notice, the right to a real opportunity to appear and defend, and the right to their day in court in violation of the due process clause of the 14th Amendment. See *Postal Telegraph Cable Co.* v. *Newport,* 247 U. S. 464 at 475; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 at 682; *Scott* v. *McNeal,* 154 U. S. 34 at 45, 46; *Pennoyer* v. *Neff,* 95 U. S. 714 at 727, 733.

Furthermore it should be borne in mind that in the *Burke* v. *Kleiman case* only one violation of the covenant was sought to be enjoined in respect to one parcel of property owned by the defendant Kleiman. Therefore, assuming for the moment that *Burke* v. *Kleiman* could have been a representative suit, the decree would have been binding only upon the *particular property* charged with the violation that being the only property within the jurisdiction of the court. It could not have been binding

upon all the lots in the area as it would have in effect prejudged many possible controversies not yet arisen in respect to more than 500 lot owners and alleged signatories to the covenant merely to settle the issues involved in the one case of *Burke* v. *Kleiman*. It would have prejudged all questions of execution on the part of any and all of the alleged signatories to the covenant; it would have prejudged all questions of authority on the part of agents, trustees, agents for corporations, guardians and minors or the like to execute the alleged covenant; it would have prejudged unforeseen facts and circumstances such as changes in the neighborhood which would have rendered enforcement of the alleged agreement so harsh, oppressive, unreasonable and burdensome as to make it unenforceable in a court of equity. See *Saunders* v. *Poland Park Company* (Md. Court of Appeals), 198 Atl. 269, in support of this proposition. See also *Pennoyer* v. *Neff*, 95 U. S. 714 at 733; *Boswell's Lessee* v. *Otis*, 9 Howard 336 U. S. at 347, 348, 350.

It therefore follows that *Burke* v. *Kleiman* could not be *res judicata* as to the properties involved in this case, the court not having jurisdiction of either the property or the parties. See *Boswell Lessee* v. *Otis, et al.*, 9 Howard 336 at 350.

A. Of all the petitioners entitled to urge full and complete defenses, certainly the petitioners, Supreme Liberty Life Insurance Company and Harry H. Pace, sued as its President were entitled to present them. Mortgagees were expressly exempt from the operation of the alleged agreement. (Rec. 452.) Not having purchased any property in the area and having acted only in a manner entirely lawful and permitted even under the alleged agreement and being authorized under the laws of the State

of Illinois to make mortgages on real estate, the arbitrary act of the court in applying the doctrine of *res adjudicata* was not merely erroneous but deprived these petitioners of their substantial, substantive rights and seriously interfered with and hampered their competitive opportunities to make earnings from investments. Certainly these petitioners had the right to be heard on the question whether this alleged covenant had ever been executed by the owners of 95% of the frontage in the area involved, but the court denied them such right when it sustained the plea of *res adjudicata* interposed by respondents. Petitioners were charged with conspiring to violate a covenant, which by the evidence adduced at the trial was shown conclusively and indubitably never to have existed. This was a direct denial of due process and we submit that such action cannot be countenanced by the highest tribunal of our nation.

B. In the instant case, the trial chancellor found that the restrictive agreement involved in this case and in *Burke* v. *Kleiman* was an invalid agreement because the required frontage consent of the owners of 95% of the frontage had never been obtained, but only 54%. (Rec. 266-267, 110.) Nevertheless the Chancellor found that *Burke* v. *Kleiman* was a representative or class action. (Rec. 118-119.) It is difficult to understand how any class could ever have existed when the condition precedent of frontage consent of 95% had never been complied with. The decree of *Burke* v. *Kleiman* was therefore, a void decree and the court had no jurisdiction to enter the decree therein. See *Scott* v. *McNeal*, 154 U. S. 34 at 45, 46; *Old Wayne Mutual Life Insurance Company of Ind.* v. *McDonough*, 204 U. S. 8 at 15-17, 23; *Matthews* v. *Rodgers*, 284 U. S. 521 at 529-30; *Christopher* v. *Brusselback*, 302 U. S. 500 at 505; *Hovey* v. *Elliot*, 167 U. S. 409.

Moreover, it is clear that each signer of the alleged restrictive agreement did not waive or surrender his right to contest the due and proper execution and acknowledgment of the said agreement, nor did he waive or surrender his right to contest compliance with the condition precedent to the agreement becoming operative—to-wit the execution and due acknowledgment of said agreement by the owners of 95% of the frontage. In these respects there could be no representation and the execution of the agreement might be contested by him, by any other, or by all of the purported signers whenever their property was sought to be charged or burdened. See *Christopher* v. *Brusselback*, 302 U. S. 500 at 503 to 505. In the instant case petitioner Katz denied the execution and acknowledgment of the agreement (Rec. 79, 81), and Eva Somerman, a witness for the respondents, the Hansberry's predecessor in title denied that she acknowledged the agreement (Rec. 130); and yet the holding by the court that *Burke* v. *Kleiman* was *res judicata* precluded the court from giving the proper consideration to their testimony.

The decree of the courts below in this case is therefore, void and entered without jurisdiction in violation of the due process clause of the 14th Amendment to the Constitution of the United States. See *Scott* v. *McNeal*, 154 U. S. 34 at 45, 46; *Postal Telegraph & Cable Co.* v. *Newport*, 247 U. S. 464 at 475; *Brinkerhoff-Faris Trust and Savings Bank* v. *Hill*, 281 U. S. 673 at 682.

II. The trial chancellor found the proceedings in the case of *Burke* v. *Kleiman* to have been fraudulently and collusively brought and the decree therein to have been fraudulently and collusively obtained upon the basis of a false stipulation of facts between the attorneys that the required frontage consent of 95% had been obtained al-

though only 54% of the frontage by ownership had ever consented. (Rec. 118-119, 266-268.) Nevertheless, the Chancellor held this fraudulently decree to be *res judicata* between the petitioners. The law is well settled that a fraudulent or collusive decree cannot be pleaded as *res judicata.* See *Lord* v. *Veazie,* 8 Howard 251 at 255; *Beals* v. *Ill. M. & T. R. Co.,* 133 U. S. 290; *Riehle* v. *Margolies,* 279 U. S. 218. Further it has been decided by this court in the case of *Michael* v. *Post,* 21 Wall. 398, that such a fraudulent and collusive decree and judgment is void and may be attacked collaterally. Affirmance of this decree by the Supreme Court of Illinois was consequently a denial of due process to the petitioners in violation of the 14th Amendment. It is true that the Supreme Court of Illinois stated that there was no evidence of fraud in the decree and proceedings in *Burke* v. *Kleiman* but said statement was wholly unsupported by the evidence adduced and was inconsistent with the facts and findings of the trial chancellor. In making such a statement that there was no evidence of fraud in the case of *Burke* v. *Kleiman* a substantial Federal right of the petitioners was thereby denied in violation of the due process clause of the 14th Amendment. Since the finding of the majority of the Supreme Court of Illinois was not only contrary to the finding of the trial chancellor, contrary to law but was likewise wholly without basis of any facts or evidence to sustain it. The majority opinion of the Supreme Court of Illinois has also misapprehended the very well established rule of law that a collusive and fraudulent decree cannot be pleaded *res judicata.* The chancellor found that a fraudulent and collusive suit was brought by *Burke* v. *Kleiman* (Rec. 266-268), that a false stipulation was signed by the attorneys one of whom entered an appearance for Isaac Kleiman and James Lowell Hall,

defendants, who testified that they did not employ any lawyers to represent them (Rec. 237-238) and had not authorized any lawyer to sign a stipulation in their behalf. (Rec. ..)

The Notary Public who took the acknowledgment of Olive Ida Burke to the complaint filed in the case of *Burke* v. *Kleiman,* was Fred L. Helman (Rec. 329), who was at the time of the filing of the case of *Burke* v. *Kleiman,* the Executive Secretary of the Woodlawn Property Owners Association, the object of which was the enforcement of the agreement involved in that case and in the case at bar. (Rec. 283.) Helman, in an uncontradicted affidavit appearing of record, stated positively under oath, that he was instrumental in attempting to create the restrictive agreement, and that after its filing on February 1, 1928, that he made an investigation of his own notes and papers and records of the Recorder's Office and found that the restrictive agreement had not been signed by the required frontage consent of 95% and found that the restrictive agreement had never in fact come into force or effect. (Rec. 284-286.) Helman further stated that he had supervised the filing of the case of *Burke* v. *Kleiman* in 1932 to enforce the restrictive agreement which had already been known by him for at least three and a half years not to exist. (Rec. 286, 284.) He paid the court costs and generally supervised the prosecution of the case as well as conferred with the officials of the Woodlawn Property Owners Association. (Rec. 286.) In addition to these facts, the respondents made no effort to prove the existence of any restrictive agreement, but relied wholly upon the technical doctrine of *res judicata.* Under such circumstances, the Supreme Court of Illinois in its majority opinion, finds that there is no fraud in the case of *Burke* v. *Kleiman.* In other words, there was no real or

actual controversy between the parties nominally opposed to each other in *Burke* v. *Kleiman* and the litigation was in fact carried on under the direction of the plaintiff and the Woodlawn Property Owners Association, which controlled the litigation on both sides, with a view of obtaining an opinion on a matter of law and an adjudication of a non-existent fact in a manner and way pre-determined by themselves to the injury of every purported party signatory to the alleged restrictive agreement. *Hatfield* v. *King,* 184 U. S. 163 at 165.

It has been decided repeatedly by this court, that where it is asserted that a federal right has been violated, that this court will, and must, examine the facts and the record to ascertain whether or not the federal right has in substance and effect been denied. See *Norris* v. *Alabama,* 294 U. S. 587 at 590; *Creswell* v. *Knights of Pythias,* 225 U. S. 246 at 261; *Postal Telegram Cable Co.* v. *Newport,* 247 U. S. 464 at 473; *Carlson* v. *Curtis,* 234 U. S. 103 at 106; *Southern Pacific R. R. Co.* v. *Schuyler,* 277 U. S. 601 at 611.

III. The enforcement by the State's judicial officers, agencies and courts, of such a harsh, oppressive and discriminatory agreement is state action, and therefore, a denial of the petitioners' right to due process of law in violation of the 14th Amendment to the Constitution. See *Brinkerhof-Faris Trust and Savings Co.* v. *Hill,* 281 U. S. 673 at 682; *Carter* v. *Texas,* 177 U. S. 442; *Gandolfo* v. *Hartman,* 49 Fed. 181; *Ex parte Virginia,* 100 U. S. 339. It would be therefore, a very narrow and strained construction of the 14th Amendment to hold that while the state and the municipal legislatures are forbidden to discriminate against citizens in their legislation, that nevertheless the state courts by their judicial recognition and participation in such agreements, could nevertheless by

their state action do something which the sovereign legislature might not do. See *Gandolfo* v. *Hartman*, 49 Fed. 181. It is one thing to say that citizens may do with their property what they please and enter into such harsh, oppressive and discriminatory restrictive agreements, as such agreements among themselves might give certain sanctions among themselves, and a certain desired effect in respect to dealing with their own property, however, when the state, through its courts, enforces such harsh, oppressive, and discriminatory restrictive agreements, it is thereby providing the necessary state action which violates the 14th Amendment. See *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 227 at 233 to 235, which holds that the Amendment may be violated by the judicial authorities of the state as well as by the legislature and executive branches, and further, that whoever acts in the name and for the state, is clothed with the state's power, and is acting for the state. The petitioners contend that it is the *enforcement* of this harsh, oppressive and discriminatory restrictive agreement against citizens of the United States by the judicial authorities of the state, which violates the 14th Amendment. See *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S. 673 at 682; *Carter* v. *Texas*, 177 U. S. 442; *Strauder* v. *West Virginia*, 100 U. S. 303.

The restrictive agreement by its own terms required the use of the State's public offices for its creation and enforcement; and the state thereby became a necessary part of it. The agreement provided that it should be of no force or effect unless it was recorded in the office of the Recorder of Deeds of Cook County, Illinois. It further provided that the agreement may be enforced by any permissible legal or equitable proceedings, including proceedings to enjoin violation and for specific performance.

Hence it looked forward to and depended for its efficacy upon its enforcement by the state judicial officers, agencies and governmental machinery. The state was therefore, an active party and contemplated as such in this agreement, and when these individuals entered into such an agreement and provided for the active participation of the State in the creation of the agreement and other enforcement thereof, the state thereby became so integral a part of said agreement, that its enforcement would amount to State action and the violation of the 14th Amendment to the Constitution of the United States. See *Chicago, Burlington & Quincy Railroad* v. *Chicago,* 166 U. S. 227, at 233 to 235; *Ex parte Virginia,* 100 U. S. 339; *Carter* v. *Texas,* 177 U. S. 442.

Sections 1977 and 1978 of the United States Revised Statutes (Title 8, U. S. C. A., 41, 42) passed pursuant to the 14th Amendment, are as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other."
>
> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

It has been held by this court that a right which arises under the Constitution and Laws of the United States is a privilege and immunity which will be protected by the 14th Amendment. *Twining* v. *New Jersey,* 211 U. S. 78. When the petitioners Hansberry purchased the property

at 6140 Rhodes Avenue, they exercised their national citizenship conferred by the above statute and the 14th Amendment. The right to own and occupy real estate is a privilege and immunity acquired by reason of the petitioners' national citizenship under the 14th Amendment to the Constitution. The very status of national citizenship connotes equality of rights and privileges so far as they flow from such citizenship, everywhere within the limits of the United States, and further, that the 14th Amendment in effect makes that citizenship "paramount and dominant" instead of "derivative and dependent" upon state citizenship. See *Colgate* v. *Harvey*, 296 U. S. 404.

And furthermore the enforcement of an agreement which prohibits ownership of real property by a citizen of the United States is contrary to the natural and inalienable rights of a citizen by virtue of his national citizenship under the 14th Amendment. See *Colgate* v. *Harvey*, 296 U. S. 404 at 430, 431, 433.

IV. The decree entered by the trial chancellor and affirmed by the Supreme Court of Illinois, directed the Hansberrys to give their property to some white person without providing for any compensation. This action of the state courts is pure and unadulterated confiscation of the building and property of the Hansberrys and is a manifest violation of the 14th Amendment to the Federal Constitution. This decree is so plainly arbitrary and so contrary to law as to amount to a mere spoliation. See *Delmar Jockey Club* v. *Missouri*, 210 U. S. 324 at 335.

V. The decree of the State Court enjoining Israel Katz is so plainly arbitrary and contrary to law and without basis of evidence as to amount to a mere spoliation of the petitioner and as a consequence was an arbitrary and capricious judicial seizure of his property and

denial of his rights without due process of law in violation of the 14th Amendment to the Federal Constitution.

The complaint of the respondents charged that the petitioner Katz, listed his property for sale with James J. Burke, and that he made threats to sell his property to colored people. Katz testified that he never at any time had any conversation with James J. Burke about the sale of his property at 6018 Vernon Avenue (Rec. 239), *and this fact was never rebutted in any manner whatsoever by the respondents.* The complaint also charged that Katz made threats to sell his property. (Rec. 17-18.) No threats by Katz whatsoever were ever proved. The respondents merely offered the following things as evidence of threats by Katz: That Katz was subpoenaed as a witness in a proceeding before the State Department of Registration and Education in February or July, 1937, according to respondents' witness Raymond (Rec. 169-170); that while testifying as a witness in this proceeding against William I. Sexton, a real estate broker, Attorney Harry E. Raymond, one of the attorneys for the respondents as shown by the record in this case, and one of the attorneys for the plaintiff in the case of *Burke* v. *Kleiman,* asked Katz the following question: "Would you sell your property at 6018 Vernon Avenue to colored people, notwithstanding the agreement that is recorded in the particular district, Washington Park District, in which your property is located, and in which you the owner, then owner of this property was a signer for yourself?" And Katz said: "Yes. I would. I would sell it to anybody that I could get to purchase it. I would sell it now if I could." This was not a threat, but was an answer elicited by the respondents themselves or their agents from a witness who was subpoenaed by them and who was answering a *hypothetical* question put by their attorney. In other

words, the only evidence in the record as to any threat is a *privileged* statement made by the petitioner Katz, and *induced* by the respondents themselves while upon the witness stand in another proceeding in February, 1937 or July, 1937, as stated by the witness Raymond (Rec. ..). The witness Raymond was in utter confusion as to the date of this testimony by the petitioner Katz, and testified that it was made either February, 1937, which was at least four months prior to the filing of the injunction suit or in July, 1937, which would have been after the filing of the complaint in this cause, which was filed on June 7, 1937.

In other words, the supposed statement of Katz was not of such imminent or immediate pending nature that an injunction was necessary to protect the rights, if any, of the respondents. A substantial Federal right has been denied the petitioner Katz, and a decree of injunction has been issued against him without any real basis of evidence. In order to determine the violation of the Federal right asserted by the petitioner Katz, we submit that the court should examine the record for the purpose of determining the violation of the Federal right asserted. See *Norris* v. *Alabama*, 294 U. S. 587 at 590; *Creswill* v. *Knights of Pythias*, 225 U. S. 246 at 261; *Truax* v. *Corrigan*, 257 U. S. 312 at 324-325.

CONCLUSION.

It is therefore, respectfully submitted that this one calling for the exercise by this court of it visory powers in order that the errors herein out may be corrected; that the law may be prop authoritatively defined, and that the judgment an of the Circuit Court of Cook County, Illinois, an Supreme Court of Illinois should be reversed that justice may be done to your petitioners; to such an end a writ of certiorari should be gra this court should review the decision of the Court of Illinois and finally, reverse the same.

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APPENDIX.

OPINION OF THE SUPREME COURT OF ILLINOIS.

Majority Opinion.
Dissenting Opinion.

Docket No. 25116—Agenda 19—April, 1939.
Anna M. Lee *et al.*, Appellees, *v.* Carl A. Hansberry, *et al.*, Appellants.

MR. JUSTICE JONES delivered the opinion of the court:

Plaintiffs (appellees here), brought an action in the Circuit Court of Cook County for the purpose of enforcing a certain "restrictive agreement" concerning the real estate of approximately five hundred owners in the City of Chicago. The substance of this agreement, set forth *in haec verba* in *Burke* v. *Kleiman*, 277 Ill. App. 519, was that no part of the property restricted should be sold, leased to, or permitted to be occupied by any person of the colored race prior to January 1, 1948. The property covered by the agreement consists of approximately twenty-seven blocks and parts of blocks between Sixtieth and Sixty-third Streets, and between Cottage Grove and South Park Avenues in Chicago. The agreement contained the following provision: "This agreement and the restrictions herein contained shall be of no force or effect unless this agreement or a substantially similar agreement, shall be signed by the owners above enumerated of ninety-five per centum of the frontage above described, or their heirs or assigns, and recorded in the

office of the Recorder of Deeds of Cook County, Illinois, on or before December 31st, 1928."

The complaint alleged that the owners of ninety-five per cent of the frontage signed the agreement and that it was recorded February 1, 1928. It further alleged a conspiracy on the part of the defendants to destroy the agreement by selling or leasing property in the restricted area to Negroes. It charged that Eva Sommermon, one of the signers of the agreement, conveyed her property to one Stoltz, who, on the same day, conveyed it to the First National Bank of Englewood; that, through fraudulent concealment on the part of the defendants James J. Burke and Harry A. Pace, from the bank, of the face Hansberry was a Negro and that the property was being purchased for him, a deed was procured from the bank to Jay B. Crook, who, in fact, purchased for Hansberry; that the deed from the bank to Crook was not delivered until May 26, 1927, but that on May 19, 1937, Crook and his wife executed and delivered a trust deed to the Chicago Title and Trust Company, as trustee, to secure their note for $4,400 payable to defendant the Supreme Liberty Life Insurance Company, of which defendant, Pace, a colored attorney, was president. May 26, 1937, the day the deed was delivered, Hansberry and his family moved into the premises.

The answer of defendants denied that the owners of ninety-five per cent of the frontage described in the restrictive agreement had signed the agreement, and asserted the agreement never went into effect. It also denied the principal allegations of the complaint and set up several affirmative defenses. To the defense that the agreement was never executed plaintiff replied that that question was *res judicata*, having been determined in *Burke* v. *Kleiman*, *supra*, and in other cases in the Circuit and

Superior Courts of Cook County. The Chancellor reserved his ruling on the plea of *res judicata* and the cause proceeded to a hearing on the merits. At the close of the evidence the court found that the owners of only about fifty-four per cent of the frontage had signed the agreement, but held the question of execution was *res judicata.* A decree was entered in conformity with the prayer of the complaint, restraining defendant Burke from selling or leasing any real estate within the restricted area to Negroes, or to white persons for the purpose of selling or leasing to Negroes; restraining defendant Katz from selling or leasing a certain described building to Negroes; restraining defendants Pace and the Supreme Liberty Life Insurance Company from making any further loans on real estate in the restricted area to Negroes or for occupancy by Negroes; declaring the conveyance to Hansberry and wife void and ordering them to remove from the premises, and holding the restrictive agreement valid and in full force and effect. Inasmuch as a freehold is involved, defendants have appealed directly to this court.

In order to decide whether the question of due execution is *res judicata,* it will be necessary to examine the case of *Burke* v. *Kleiman, supra.* That was a suit to enforce this same agreement. Olive Ida Burke, wife of James J. Burke, a defendant in the case at bar, was plaintiff. The complaint recited that she filed it "on behalf of herself and on behalf of all other property owners in the district covered and affected by the agreement hereinafter mentioned, and who are, or whose grantors, direct or otherwise, were parties to said indenture of agreement, and whose property interests will be adversely and injuriously affected by the violation hereinafter mentioned by the said defendants of the covenants and terms of said agreement." The defendants were Isaac Kleiman, the white owner, Sam Kleiman, James

L. Hall, a Negro tenant, and Charles J. Sopkin, trustee of a trust deed on the property. The complaint alleged the agreement was signed by the owners of ninety-five per cent of the frontage and duly recorded February 1, 1928. A stipulation was entered into to this effect. The court recited the stipulation in its decree and found that the facts stipulated were true. The court further found, "that said indenture was in full force and effect on February 1, 1928, and all conditions therein contained with respect to execution and recordation thereof, were fully complied with;" that "all terms of said indenture agreement are entirely valid and binding," and that it is a covenant running with the land. This decree was affirmed by the Appellate Court.

It thus appears that *Burke* v. *Kleiman, supra,* was a class or representative suit. It cannot be seriously contended that it was not properly a representative suit. There was a class of individuals who had common rights and who needed protection. They were so numerous it would have imposed an unreasonable hardship and burden on them to require all members to be made parties to the suit. Under such circumstances we have repeatedly held that a court of equity has jurisdiction of representative suits, and where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs, other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings. *Goves* v. *Farmers State Bank,* 368 Ill. 35; *Leonard* v. *Bye,* 361 *id.* 185; *Greenberg* v. *City of Chicago,* 256 *id.* 213.

Appellants contend the doctrine is inapplicable here for the reason there was no class, since the evidence shows the requirement that the owners of ninety-five per cent of the frontage sign the agreement, was not met. This

rgument loses sight of the fact that in *Burke* v. *Kleiman, upra,* the court had jurisdiction to determine whether r not that condition precedent had been complied with. The mere fact that it later appears that the finding is ntrue does not render the decree any the less binding. The principle of *res judicata* covers wrong as well as ight decisions, for the fundamental reason that there nust be an end of litigation. A matter which has once een determined by a court of competent jurisdiction annot, in a later suit involving the same subject matter nd the same parties or members of the same class, be gain inquired into.

We see no merit in the contention that *Burke* v. *Klei-an, supra,* is not *res judicata* because the fact of due xecution was established by stipulation. There is no evi-ence of fraud or collusion in that case. Defendant Burke, who was beneficial owner of plaintiff's property, vers in his answer here that that suit was instituted at he instance of the Woodlawn Property Owners Associa-ion, whose purpose was the enforcement of the restric-ive agreement. That may be true, but there is no show-ng of fraud or collusion in procuring that stipulation r that there was not an actual controversy in the case. t that time Burke was an officer of the Woodlawn Prop-rty Owners Association. Afterwards he resigned his osition and withdrew from the association with ill feel-ngs, and stated several times that he would put Negroes n every block of that property. In carrying out his hreat, he falsely represented that prospective customers ere white. As far as the record shows, if any fraud as committed, it was by Burke after he left the asso-ation. It does not appear that he was not acting in ood faith in *Burke* v. *Kleiman, supra.*

In our opinion the questions of execution and validity

of the restrictive agreement are *res judicata.* The reasons assigned, in addition to these urged in *Burke* v. *Kleiman, supra,* for holding the agreement invalid cannot be considered. It is well settled that the doctrine of *res judicata* extends not only to matters actually determined in the former suit, but also embraces all grounds of recovery and defense involved and which might have been raised. By assigning new reasons for holding the agreement invalid, which existed at the time that decision was rendered, the parties cannot relitigate the question settled by the prior decree. *In re Northwestern University,* 206 Ill. 64; *Midlinsky* v. *Rubin,* 341 *id.* 378; *People* v. *Wade,* 351 *id.* 484; *Webb* v. *Gilbert,* 357 *id.* 340.

The evidence fully justifies the finding of the Chancellor that the charges of the complaint were established, and appellants do not argue to the contrary, except as to Israel Katz. There was testimony that he said he would sell his property to anybody, including Negroes. This is sufficient evidence to warrant enjoining him from doing that which he is bound by the restrictive agreement not to do.

Appellants contend it was error to restrain the Supreme Liberty Life Insurance Company from making loans in the restricted area to Negroes or for Negro occupancy, for the reason mortgagees were expressly exempted from the operation of the restrictive agreement. The provision relied on is "and provided, further, that the lien of no mortgage or trust deed in the nature of a mortgage shall be impaired or invalidated by reason of the breach of any of the provisions of this agreement, whether any such breach shall have occurred prior or subsequent to the recording of any such mortgage or trust deed." The next clause is "and provided, further that nothing contained in the foregoing provisions shall in any manner

impair the right of any person or persons interested, to enforce at all times and against all persons the restrictions in this agreement contained prohibiting the use or occupation of all or any part of said premises by a Negro or Negroes." That part of the agreement relied on merely provides that the loan or mortgage shall not be invalidated by reason of its being made in violation of the restrictive agreement. It does not give mortgagees a license to conspire to destroy the agreement, as the evidence shows this insurance company was doing. The decree simply restrains them from making such loans in the future; it does not attempt to hold any existing loans or mortgages invalid. The court did not err in this respect.

We cannot agree that the court erred in overruling appellants' motion to set aside the decree and for a new trial. This motion was supported by an affidavit of Fred L. Helman, which recited that Helman was executive secretary of the Woodlawn Property Owners Association from 1926 to 1933. The substance of the affidavit is that he had charge of the work of obtaining signatures to the restrictive agreement, and that at the time the case of *Burke* v. *Kleiman, supra,* was instituted, as a result of his own investigation, he knew that the owners of ninety-five per cent of the frontage involved had not signed the agreement, and that he conferred with various officials of the association in regard to the filing of that suit. The affidavit does not state that he communicated his information to anybody, or that Olive Ida Burke or any individual of the representative class for whose benefit the suit was brought, or any of the officers of the association, except Helman, knew of this fact. As far as the affidavit discloses Helman is the only person who knew of the defect. It does not allege the suit was

brought at the request of the association or that it was not instituted by Mrs. Burke of her own volition and in good faith, for the benefit of herself and the other members of the class. The motion was properly denied.

The decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

Mr. JUSTICE SHAW, dissenting:

The opinion of the majority depends on its holding that the case of *Burke* v. *Kleiman, supra,* is *res judicata* of the points involved and that those points are not subject to further judicial examination. It is said first, that this was a class or representative suit, and second, that in that case the court had jurisdiction to determine whether or not the necessary ninety-five per cent of the frontage had signed up. It is further insisted that the question of jurisdiction cannot be collaterally attacked but that the only remedy must have been by appeal from the judgment in that case.

The opinion of the trial judge is based entirely upon the grounds of *res judicata* and he very reluctantly felt himself bound by the prior decision. Reference to the abstract of record shows a definite finding of the fact that the agreement was never signed by the requisite number of property owners and, in the words of the trial judge: "in other words, there is an invalid agreement which is now sought to be enforced * * * and we know it was a fraud because the proof now shows that there wasn't ninety-five per cent * * * he committed a fraud when he brought this lawsuit," etc.

The undisputed fact is that by means of fraud and collusion between total strangers and agreement which is void on its face has been imposed upon some ten

million dollars worth of the property of five hundred other parties who were never in court, who never had notice of any lawsuit, who were never by name or as unknown owners made parties of any lawsuit, and who have never been accorded any process whatever, either due or otherwise. And it is said that this is binding upon them; that they constituted a class because one man fraudulently said they did and another man collusively, and with equal fraud, admitted the allegation, because this second man signed a stipulation saying they had signed an agreement which they had never signed. Certainly no man's rights can be safe under such a rule of law. If one man can allege that I signed an agreement and another total stranger admit that I signed it and fraudulently bind me by this sort of an agreement, it would be contrary to the Fourteenth amendment of the constitution of the United States. The trial judge found the entire case of *Burke* v. *Kleiman* tainted with fraud, procured by collusion, and intended only to validate an otherwise invalid agreement. He very reluctantly entered a decree in this case because of a mistaken idea that the former judgment was *res judicata.*

The opinion in this case states that the defendants were so numerous that it would have imposed an unreasonable hardship and burden to make them all parties to the suit. This is a definite overruling of *Whitney* v. *Mayo,* 15 Ill. 251. It is true there were five hundred defendants, but even the humblest of these five hundred had a right to his day in court, to be made a party to the suit and to be given an opportunity to defend it. Their names were on the public records of Cook County and not the slightest excuse appears for not making them parties to the suit. If one sought to bind all the property in the

City of Chicago by some restrictive covenant, he would assume the burden of making every property owner in that city a party to his suit, either by name or as unknown owner, if he was, in fact, unknown. He could not gain an advantage for himself through a fraudulent scheme simply by saying they were too numerous to mention.

The want of due process is so obvious as to require no argument and it must be admitted. It is said, however, that the court had jurisdiction to determine whether or not it had jurisdiction, and a mere restatement of this proposition refutes it. A court never has jurisdiction to determine that it has jurisdiction when it, in law, has not. The question of whether or not a court has jurisdiction of the parties and the subject matter remains forever open and forever subject to collateral attack. No court can expand its own jurisdiction simply by finding that it has jurisdiction unless that finding is based upon a question of fact which it has power to decide. In *Caswell* v. *Caswell,* 120 Ill. 377, and in many subsequent cases, this rule has been made clear. (*Beck* v. *Lash,* 303 Ill. 549.) The most recent reference to it in this court is to be found in *People* v. *Sterling,* 357 Ill. 354, where we pointed out the distinction between that kind of fraud which goes to the jurisdiction of the court, as distinguished from that other kind which intervenes to procure a decree after the court has obtained a valid jurisdiction. The rule is too clear for restatement. Fraud which impairs or prevents attachment of jurisdiction may always be raised collaterally, and it is only that kind which intervenes after jurisdiction has been obtained that cannot be attacked.

We have in the case before us both kinds of fraud: Fraud in the procurement of the decree by a false stipu-

lation, and a fraud going to the jurisdiction of the court in the very basic and essential allegation that there was a valid agreement that it was actually signed by the necessary ninety-five per cent of frontage owners, and fraud in the jurisdictional allegation that there was a class to be represented when, in fact, no such class ever existed.

It is my opinion that even if the attempted agreement had been signed by the owners of ninety-five per cent of the frontage involved, and if the case of *Burke* v. *Kleiman* had been brought in good faith instead of fraudulently, it still could not have been such a class or representative suit as would impair the title of other property owners. Without going into extensive citations of authority, it seems clear to me that a class suit cannot properly be entertained except in that very limited field of cases where the parties have not only a common and general interest among themselves but also an identical right to be protected in a single and undivided res. The entire theory of class representation is a dangerous exception to the general rule that each interested person must be made a party by name, notified of the proceedings and given his day in court. The rules guarding it must be so strict and carefully enforced as to be commensurate with the risks of injustice which are involved. Due process most certainly required notice and an opportunity to be heard, and no case has come to my attention where the court has failed to make absolutely certain, in advance, that the parties to represent a class must be selected with such care and have such personal interest in the litigation as to guarantee that the rights of all will be fully protected.

In the case before us, each property owner held and owned his property in severalty. He might or might not

wish the covenant enforced. He might or might not wish to contest its validity. He might or might not wish to sell, lease or mortgage his property without regard to it. On any of these questions, his next door neighbor or any other property owner in the district might disagree with him. There could be no certainty nor even any probability that they would all agree on a course of conduct to be followed at any particular time or under any particular circumstances. There was no common right nor any common fund, nor any common or undivided res to be dealt with, and certainly no one ever had any right or power to speak for any one but himself.

The agreement which formed the foundation for this fraudulent case of *Burke* v. *Kleiman* provided on its face that it should be void and of no force or effect unless signed by the owners of ninety-five per cent of the frontage involved within a certain time and placed of record within a certain date. To me, it seems obvious that until those signatures were obtained and the very terms of the agreement itself complied with, there could by no possibility be even the semblance of a class to be represented in a class suit, even if such a suit could be possible under the circumstances, and it seems to be equally beyond question that such a defect in signers could not, in a court of chancery, be obviated through a fraudulent allegation that they had, in fact, been obtained when they had not, and an equally fraudulent and collusive and false stipulation that the owners had signed.

Mr. Justice Murphy concurs in this dissenting opinion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 29

CARL A. HANSBERRY, NANNIE L. HANSBERRY, *et al.*,

Petitioners,

vs.

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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF PETITIONERS.

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PETITION FOR CERTIORARI FILED MARCH 11, 1940.
CERTIORARI GRANTED APRIL 22, 1940.

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B. The purported agreement involved in *Burke* v. *Kleiman* and in the instant suit provided that it was to be null and void and of no force and effect unless signed, sealed and acknowledged by the owners of 95 per cent of the frontage. The proof in the instant case, as found by the trial chancellor, showed that this condition precedent to validity was not complied with; consequently, no agreement ever came into force or effect and there was no class to be represented by anyone. The court had no jurisdiction to bind the petitioners and their privies who were not parties and not served with summons or process in said cause. The decree of *Burke* v. *Kleiman* was therefore void and could not be pleaded as *res judicata* against these petitioners.....40-45

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CARL A. HANSBERRY, NANNIE L. HANSBERRY, *et al.*,

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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF PETITIONERS.

OPINION OF THE COURT BELOW.

(Majority and Dissenting Opinion.)

The opinion of the Supreme Court of Illinois is reported in 372 Ill., page 369, of the Illinois Reports, and also in 24 N. E. 2nd, page 37, as well as in the record filed in this cause (R. 327-336).

JURISDICTIONAL STATEMENT.

1. The jurisdiction of this Court is based upon Section 237b of the Judicial Code as amended by the Act of February .13, 1925; Volume 8, Fed. Code Annotated (FCA), Title 28. Judicial Code, Section 344(b).

The Supreme Court of Illinois, on October 10, 1939, by *a divided court,* affirmed the judgment or decree of the Circuit Court of Cook County, Illinois, in favor of the respondents herein and against the petitioners. (Volume 372 Ill., page 369, 24 N. E. (2d) 37.) Petition for rehearing was later filed by petitioners within the time allowed by the rules of the Supreme Court of Illinois on the 4th day of November, 1939 (R. 337), and afterwards was denied on December 13, 1939, and the petition for certiorari was filed in this court within three months after the denial of the petition for rehearing in the Supreme Court of Illinois.

The affirmance of the decree of the trial court in its wrongful application of the doctrine of *res judicata* denied the petitioners notice and a real opportunity to appear, to be heard, and to defend, and violated the petitioners' rights to due process of law under the 14th Amendment to the Federal Constitution under which Amendment the petitioners specially set up and claimed certain rights, titles, privileges and immunities. See *Postal Cable Telegraph Co.* v. *Newport,* 247 U. S. 464 at 476; 38 S. Ct. 566, 62 L. Ed. 1215; *Wabash Railway Co.* v. *Adelbert College,* 208 U. S. 38 at 57-58 and 59, 28 S. Ct. 182, 52 L. Ed. 379; *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662 at 671; *Smith* v. *Swormstedt,* 16 Howard 288 at 303; *Hamer* v. *New York Railways Co.,* 244 U. S. 266 at 273; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 at 682; *Scott* v. *Donald,* 165 U. S. 107 at

115 to 117; *Pennoyer* v. *Neff*, 95 U. S. 714 at 733; *Scott* v. *McNeal*, 154 U. S. 34 at 45 and 46; *Williams* v. *Gibbes*, 17 Howard 239 at 254, 257; *Simon* v. *Craft*, 182 U. S. 437; *Ward* v. *Board of County Commissioners*, 253 U. S. 17 at 22; *Chase National Bank* v. *Norwalk*, 291 U. S. 431 at 438; *Windsor* v. *McVeigh*, 93 U. S. 274 at 277; *Earle* v. *McVeigh*, 91 U. S. 503; *Hale* v. *Hale*, 146 Ill. 227, 258; *Weberpals* v. *Jenny*, 300 Ill. 156.

The affirmance of the decree of the trial court necessarily deprived the Hansberrys of their rights and property without due process of law in violation of the 14th Amendment to the Federal Constitution because no compensation was provided for them in or by said decree thereby amounting to a spoliation and said Hansberrys specially set up and claimed rights, privileges, titles and immunities as citizens of the United States of America under Section One of the 14th Amendment to the Federal Constitution which was thereby drawn in question; and moreover the said Hansberrys, petitioners, were denied due process of law and the equal protection of the laws, and their rights, privileges, and immunities as citizens of the United States were abridged. See Delmar Jockey Club in Missouri, 210 U. S. 324 at 335. *Chicago Burlington and Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226; *Davidson* v. *New Orleans*, 96 U. S. 97, 102.

The petitioners set up and claimed specially under the 14th Amendment to the Federal Constitution certain rights, titles, privileges and immunities which they asserted were denied and abridged by the enforcement, by the state's judicial officers and courts, of a harsh, oppressive and discriminatory property owner's covenant, and the 14th Amendment to the Federal Constitution was thereby necessarily drawn in question by the decree and judgment of the Illinois Supreme Court in sustaining

the lower court's decree. *See Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226 at 233-35; *Home Telegraph, etc.* v. *Los Angeles,* 227 U. S. 278; *Ex parte Virginia,* 100 U. S. 339; *Strauder* v. *West Virginia,* 100 U. S. 303; *Carter* v. *Texas,* 177 U. S. 442; *Colgate* v. *Harvey,* 296 U. S. 404 at 430-433.

The petitioners' rights to due process of law were denied and abridged by the affirmance of the decree of the trial court which reluctantly held that *Burke* v. *Kleiman,* though a fraudulent and collusive suit, was *res judicata* and therefore binding upon the petitioners in the instant case. See *Lord* v. *Veazie,* 8 Howard 251 at 255; *Michaels* v. *Post,* 21 Wall. 298; *Caswell* v. *Caswell,* 120 Ill. 377; *Beck* v. *Lash,* 303 Ill. 549; *People* v. *Sterling,* 357 Ill. 354.

The rights of the petitioner Katz to due process of law were denied and abridged in that the decree enjoined said Katz without any evidence whatsoever in support of said injunction so that said decree amounted to an arbitrary and capricious judicial seizure of Katz' property. See *Chicago Burlington and Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226 at 233-235; *Delmar Jockey Club* v. *Missouri,* 210 U. S. 324 at 335; *Norris* v. *Alabama,* 294 U. S. 578 at 590; *Creswill* v. *Knights of Pythias,* 225 U. S. 246 at 261; *Truax* v. *Corrigan,* 257 U. S. 312 at 324-5.

The petitioners' rights to due process of law were denied and abridged in that the decree of *Burke* v. *Kleiman,* a void judgment or decree, was pleaded and sustained as *res judicata* against them. The decree in the instant case found that *Burke* v. *Kleiman* was a class suit and therefore binding upon the petitioners herein, although no class in fact ever existed, as shown by the finding of the trial chancellor both in his oral opinion (R. 192-193) and decree that the agreement sought to be specifically

enforced was executed by 54 per cent of the frontage instead of 95 per cent, as required by its own terms. (R. 78.) The court in *Burke* v. *Kleiman* lacked jurisdiction of the parties and the subject matter because the agreement sought to be enforced had never become operative by its own terms. See *Christopher* v. *Brusselback,* 302 U. S. 500; *Old Wayne Life Ass'n. of Ind.* v. *McDonough,* 204 U. S. 8 at 15-17, 23; *Scott* v. *McNeal,* 154 U. S. 34 at 45, 46.

The petitioners raised the Federal questions sought to be reviewed by filing their several and respective motions to strike and dismiss the respondents' suit, in which they contended that the enforcement of the restrictive agreement violated the 14th Amendment and Sections 1977 and 1978 of the Revised Statutes and was contrary to the aims, purposes and objects as expressed in the Federal Constitution (R. 15-19). The trial court overruled the petitioners' several and respective motions to strike and dismiss (R. 20).

The petitioners then filed their several and respective answers setting up the same Federal questions (R. 23-33, 36-41, 56-71). The petitioners likewise filed their several and respective motions to dissolve (R. 34-35), again asserting the Federal questions sought to be reviewed here. To the defendants' plea of *res judicata* raised in their reply, the defendants filed their several and respective rejoinders to said reply, denying that they had been estopped upon the basis of said decree of *Burke* v. *Kleiman,* and further asserted that the sustaining of a plea of *res judicata* and any estoppel against them would deny them of due process of law and the equal protection of the laws in violation of the 14th Amendment (R. 51, 53, 65-71, 71-72).

The trial chancellor in his decree (R. 72-88), sustained

the plea of *res judicata* in the reply and sustained the objections to the defendants' answers in which they had asserted the Federal Constitutional questions above set up (R. 82, 86).

Upon the trial of the cause the defendants objected to the introduction of Plaintiffs' Exhibit No. 5 (R. 142-145, 315-319) (which was the alleged restrictive agreement), on the Federal grounds above asserted. The trial court overruled said objections and allowed the introduction of the said restrictive agreement in evidence against the petitioners (R. 145). The trial court in its decree found that the enforcement of the restrictive agreement did not violate any article of the Constitution of the United States and is not unconstitutional; that it was not against public welfare; that it did not deprive the petitioners of any of their equal or civil rights nor did it deprive the petitioners or Negroes as a class, of due process of law under the Federal Constitution; and then proceeded to sustain the plea of *res judicata* as well as the objections of the plaintiffs to the answers of the petitioners (R. 86).

The petitioners again raised the above mentioned Federal Constitutional questions in their appeal to the Supreme Court of Illinois, and as provided in the rules of the Supreme Court of Illinois, assigned these errors in a portion of their brief entitled "Errors relied upon for reversal." The petition for rehearing in the Supreme Court of Illinois, raised the same Federal Constitutional question.

The affirmance by the Supreme Court of Illinois, of the decree of the trial chancellor who had ruled adversely on the Federal Constitutional questions raised by the petitioners, necessarily involved substantial Federal questions, the disposition of which were necessary to a determination of the case.

STATEMENT OF THE CASE.

Thes respondents,, Anna M. Lee, Edward L. Govanus, Esther Govanus, Louise G. Anderson, Lyman M. Anderson and Kathryn Luttrell (plaintiffs below), brought an action in the Circuit Court of Cook County, Illinois for the purpose of enforcing a certain "restrictive agreement" (R. 2-6) purporting to involve 500 or more parcels of real estate owned by 500 or more owners of a certain section in the City of Chicago. The area covered by the "restrictive agreement" consists of approximately twenty-seven blocks and parts of blocks between Sixtieth and Sixty-third Streets and between Cottage Grove and South Park Avenues in the City of Chicago, which said area is bounded on the south by approximately 12,000 colored people (R. 181), on the north and west by approximately 50,000 colored people (R. 176, 181-182), on the north by Washington Park, used predominantly by colored people (R. 182). More than 125 colored families have lived within said area for periods ranging from three to five years prior to the commencement of this action (R. 58). *The area "constitutes a white pocket within a colored area"* (R. 119) *and is entirely surrounded by colored people; it includes South Park Avenue which runs through and is adjacent to the heart of* the South Side district in Chicago occupied by at least 150,000 colored people. The area in question is not separated from the territory generally occupied by colored people in Chicago, but is contiguous to the so-called colored district that has steadily, since 1914, developed southward from Twenty-second Street. As the colored population increased, the area continued to expand southward to Sixtieth Street where the "restricted" area begins and then, as housing facilities became more scarce,

the population penetrated further south and east of the said restricted area beyond Sixty-third Street—the end of the said "restricted" area—*leaving said area practically encircled by colored people.*

Prior to the year 1914 the community occupied primarily by Negroes did not extend beyond Twenty-second Street south of the Chicago Loop district (R. 180-183). Beginning in 1914 Negro industrial workers came north in large numbers and to the City of Chicago because of the cutting off of European immigration and the excessive demands for workers growing out of the World War. This South Side community gradually extended until the year 1928 when it had reached Sixty-seventh Street on the south, Cottage Grove Avenue on the east and Wentworth Avenue on the west (R. 180-183). The substance of this agreement in controversy was that no part of the property purported to be restricted should be sold, leased to, or permitted to be occupied by any person of the colored race prior to January 11, 1948, or thereafter, unless said "restrictive agreement" should be abrogated by the owners of 75 per cent of the frontage. The agreement, among other things, contained the following provisions:

> "This agreement and the restrictions therein contained, shall be of no force or effect unless this agreement or a substantially similar agreement shall be signed by the owners above enumerated of 95 percentum of the frontage above described or their heirs and assigns, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31, 1928." (R. 3.)

The complaint, as amended, alleged that the owners of 95 per cent of the frontage signed the restrictive agreement, and that it was recorded February 1, 1928. It further alleged a conspiracy on the part of the petitioners

to destroy the agreement by selling or leasing property in the restricted area to Negroes. It charged particularly that there had been a conspiracy between the petitioners, James J. Burke, Jay B. Crook, Harry H. Pace, The Supreme Liberty Life Insurance Company, a corporation, and the Hansberrys, to violate said restrictive agreement by the acquisition and purchase of the premises at 6140 Rhodes Avenue by the said Hansberrys through the means of Jay B. Crook (R. 7-12). The complaint further charges that the petitioner, Israel Katz, a white man, had listed for sale his property at 6018 Vernon Avenue, with James J. Burke, a white real estate broker, and had made threats to sell his property to Negroes (R. 12-13).

The complaint further alleged that the several respondents were parties to and signers of the alleged restrictive agreement; that they were the several owners of certain properties in said area and, further, that their real estate would be irreparably damaged by reason of the violation of the agreement (R. 12).

The respondents sought a temporary injunction which petitioners resisted by motions to strike the complaint and dismiss the suit and by oral argument in support thereof (R. 15-19).

On July 8, 1937, Judge Michael Feinberg, the trial chancellor ,entered, over the objections of petitioners, a temporary mandatory injunction, requiring the Hansberrys to move from the premises at 6140 Rhodes Avenue, and ordering a writ of assistance to issue upon failure of said Hansberrys to move from said premises (R. 20-21). Said order of injunction likewise found that the Hansberrys were unlawfully in title to the aforesaid premises at 6140 Rhodes Avenue (R. 22), although said cause had not been heard upon the merits, and although said case was not at issue on the pleadings. The peti-

tioner, Katz, was likewise enjoined from selling or leasing his property to colored people (R. 21).

The respondents filed their several and respective sworn and verified answers (R. 23-33, 36-41, 56-64) categorically and specifically denying the allegations of the complaint as to the charges of conspiracy, and denying that the owners of 95 per cent of the frontage described in the restrictive agreement had signed the agreement and asserting that the agreement never went into force or effect. The petitioners in their answers (R. 23-33, 36-41, 56-69) likewise set up several affirmative defenses contending that the alleged restrictive agreement was invalid and void, was an unlawful restraint on alienation, was also against the public policy of the State of Illinois and the United States of America, and that the enforcement of the restrictive agreement by the courts of the State of Illinois, would deprive the defendants of their liberty, their freedom of contract, their rights and their property without due process of law, and would likewise deprive the petitioners of the equal protection of the law, and would abridge the privileges and immunities of the petitioners as citizens of the United States of America, in violation of the 14th Amendment to the United States Constitution (R. 23, 28, 29, 33, 62).

The petitioners in their several and respective answers likewise denied that the alleged restrictive agreement was a covenant running with the land, but asserted that it was merely a personal covenant against persons on account of their race and color. Petitioners further denied that respondents were bringing a representative suit, and stated that there had been such a change in the character of the neighborhood that it would be inequitable to enforce any such alleged agreement (R. 23-33, 36-41, 56-64). The petitioner, Katz, denied the execution and ac-

knowledgment of the agreement and stated under oath that his signature to said alleged agreement had been obtained by fraud and trickery (R. 60-61, 172).

After the filing by the petitioners of their several answers, motions to dissolve (R. 34-35) were filed by them, together with affidavits (R. 36) supporting denial of the due execution and acknowledgment of the agreement and of compliance with conditions precedent contained in said agreement. To these defenses respondents replied that these questions were *res judicata,* having been determined in the case of *Burke* v. *Kleiman,* No. 567687, in the Superior Court of Cook County, Illinois (R. 44). The chancellor, Judge George Bristow, reserved rulings on the motions to dissolve of the petitioners and the plea of *res judicata* of respondents until a hearing on the merits (R. 54). The petitioners filed additional pleadings called rejoinders (R. 51-53, 65-71, 72), denying the rights of the respondents to plead estoppel by verdict, or *res judicata* and denying that the case or decree of *Burke* v. *Kleiman* could be lawfully raised as estoppel by judgment or as *res judicata* and stating that the application of *res judicata* would deprive them of their rights and property without due process of law, in violation of the 14th Amendment to the Federal Constitution.

Proof adduced at the trial on behalf of the petitioners showed that this alleged restrictive agreement never became operative or in full force and effect by its own terms; that the owners of not more than 54 per cent of the frontage involved executed the restrictive agreement (R. 150-151, 158-159, 185), although the agreement itself stated that it should not become operative until the owners of 95 per cent of the frontage executed it (R. 3). The proof further showed that none of the signatures to the alleged agreement was properly acknowledged, according

to the requirements of the laws of the State of Illinois (R. 144, 145, 189). The proof also showed that one of the signatories to the alleged covenant was Eva Somerman, who, as a witness for the respondents, said she signed the alleged restrictive agreement but did not acknowledge it (R. 92). The property involved in this suit and which was bought by Crook from the First National Bank of Englewood and thereafter sold by Crook to Hansberry, was owned by said Eva Somerman at the time the alleged agreement was executed by her (R. 92).

Proof further showed that the petitioner, Israel Katz, signed his name to a sheet of paper which was presented to him by a man who told him he was getting up a list of signatures for the improvement of the neighborhood. No acknowledgment was taken of Katz' signature by a Notary Public nor did the person who obtained his signature mention anything about a restriction against the sale of Katz' property. There is no evidence that Katz ever had any conversation with James Joseph Burke about the sale of his property at 6018 Vernon Avenue (R. 172), and the only evidence in the record as to any threat on the part of petitioner Katz to sell his property is to the effect that when he appeared at a hearing before the Department of Education and Registration in a proceeding against one William I. Sexton, a real estate broker, he was asked whether he would sell his property at 6018 Vernon Avenue to colored people and in reply, according to the testimony of Harry E. Raymond, one of the attorneys representing respondents in the court below, Katz said, "Yes, I would. I would sell it to anybody if I could get a buyer to purchase it; I would sell it now if I could." (R. 122.)

The proof further showed that the petitioner, Supreme Liberty Life Insurance Company, is an old-line legal

reserve life insurance company and that it made a first mortgage of $4,400.00 to Jay B. Crook and his wife on the premises here involved, and this loan was made in the regular course of business; that transactions involved in connection with this loan were all conducted by Crook with the Company officials; that neither Burke nor Hansberry participated therein. The testimony also showed that, among other things, as a part of its business the insurance company makes mortgage loans on property and that during the year 1937 approximately more than $144,000.00 worth of mortgages were made on premises of similar nature in the South Side community. The record also showed that prior to the making of the loan to Crook, the insurance company had the property appraised by several landowners in the City of Chicago who were experienced in the valuation of property and that the appraised value of the property ranged from $7,000.00 to $9,000.00. The petitioner, Harry H. Pace, is sued herein as the president of said Supreme Liberty Life Insurance Company (R. 13).

At the close of the evidence, the chancellor found that the owners of only about 54 per cent of the frontage had signed the agreement, which agreement itself contained the condition precedent that it should be of no force or effect unless signed by the owners of 95 per cent of the frontage (R. 78, 191-193, 198), but the chancellor in spite of his finding that the agreement was invalid by its own terms and had never come into effect, nevertheless, "reluctantly" held the question of the execution and effective validity of the agreement was *res judicata* by virtue of the decree in *Burke* v. *Kleiman*, and further held *Burke* v. *Kleiman* to be a representative suit binding upon the petitioners in the instant case. (This case of *Burke* v. *Kleiman* was affirmed in 1934 by the Appellate

Court of Illinois and reported in Vol. 277 at page 519, 189 N. E. 372.)

Notwithstanding the decree, the trial chancellor in his formal opinion (R. 191-194) rendered at the close of the case, used the following language:

> "In other words, there is an invalid agreement which is now sought to be enforced. And the answer that the plaintiffs make to that contention is not to try to show that it was properly signed by the requisite number of property owners, but that its validity has already been sustained by several courts. * * * We have a man named Burke, whose personality and activity enter into the picture. It is urged, and I think with a good deal of merit, that the lawsuit (*Burke* v. *Kleiman*) which he brought to test out the validity of the agreement was more or less a dummy proceeding, of which can be easily seen that although it appears on the face of which to be representative and class in its character, still it (*Burke* v. *Kleiman*) was concceived by him and prosecuted by him for the sole purpose of establishing the integrity and invulnerability of the district that is under the covenant; in other words, to make it unassailable. * * * And he in effect, says through himself and through those he was working with to bring about the destruction of this agreement, he says in effect, that lawsuit (*Burke* v. *Kleiman*) that I brought was a fraud, and I had no authority to represent the class, and I was not representing the class. It was my own personal lawsuit. I obtained the stipulation of the facts that the agreement contained the signatures of more than 95 per cent of the frontage, and that was all a fraud; and we know it was a fraud because the proof now shows that there wasn't 95 per cent. * * * He committed a fraud when he brought this lawsuit." (*Burke* v. *Kleiman.*)

The following are the material and pertinent facts in respect to the proceedings and the decree of *Burke* v. *Kleiman* (R. 218-246) pleaded by respondents as *res judicata*:

In October, 1932, Olive Ida Burke (wife of James J. Burke, one of the petitioners herein), owning a parcel of property at 6039 Vernon Avenue, Chicago, filed a suit in equity (R. 217, 218), purportedly on her own behalf and on behalf of all other property owners adversely affected by violation of the agreement therein mentioned, against Isaac Kleiman, owner of the premises at 417 E. Sixtieth Street, Chicago, Illinois (*not the property involved in the instant case*), Samuel Kleiman, owner of a mortgage note on said premises, Charles Sopkins, Trustee for the benefit of the owner of the mortgage note, and James Lowell Hall, a Negro tenant in said building, to enforce specifically by injunction, the same agreement sought to be enforced in the instant case.

No testimony was taken or proof adduced showing that the required frontage consent of 95 per cent had ever been obtained, but a stipulation was signed by Olive Ida Burke and by Charles J. Sopkins, an attorney who purported to act for himself and the other defendants (R. 46, 236). They merely stipulated that *95 per cent of the owners* of the property in said restricted area had signed, sealed and acknowledged said agreement (*not the owners of 95 per cent of frontage as required by the agreement*) *and that it was in full force and effect* (R. 46-47, 185, 236).

Prior to the execution of the above stipulation there was another stipulation entered into by the same counsel to the effect that the cause would be heard upon agreed facts to be stipulated without the necessity of taking oral evidence (R. 185).

A decree was entered in October, 1933, declaring said restrictive agreement to be in full force and effect and that it was a covenant running with the land and binding upon the defendants in that suit (R. 236-246), but the court did not find that it was a representative suit.

There were no other property owners or signers made parties defendant in the case of *Burke* v. *Kleiman,* except said Isaac Kleiman. The only property involved by the complaint was the property of Isaac Kleiman at 417 E. Sixtieth Street. Neither the petitioners nor any of their grantors were made parties to the proceedings of *Burke* v. *Kleiman.* There was no notice by publication or otherwise given to any of the other 500 or more property owners or signatories to the said alleged restrictive agreement. *The case was merely one where one property owner, Olive Ida Burke, not a signer of the restrictive agreement, was suing another property owner, Isaac Kleiman, not a signer of the agreement, to enforce the restrictive agreement* (R. 223, 224). The prayer of the complaint did not ask that the decree be binding upon any except the defendants against whom its enforcement was sought (R. 227-228).

Burke, former president of the Woodlawn Property Owners Association which filed the *Burke* v. *Kleiman* case, charged in his answer (R. 31-32) that the invalidity of the agreement was known to the Association at the time the several suits were conducted by it to enforce the agreement, which allegations were never rebutted by the respondents in the instant suit.

In the *Burke* v. *Kleiman* case, neither the due execution and acknowledgment of the agreement, the compliance with the conditions precedent contained therein, nor the validity of the agreement itself, were put in issue by the answers (R. 230-235) of the several defendants therein but their answers were confined to the sole unsubstantial and frivolous defense that violations in respect to three or four parcels, included in an agreement covering 500 or more parcels, constituted a change in the character of the neighborhood so as to make it inequitable to enforce the covenant (R. 230-235).

In the instant case, Isaac Kleiman and James Lowell Hall, parties defendant in the case of *Burke* v. *Kleiman,* both appeared and testified that they had not employed or authorized any lawyer to represent them in the case of *Burke* v. *Kleiman,* nor did they have any knowledge of any stipulation of facts, nor did they authorize its signing (R. 171). The chancellor in the court below in the instant case, after competent proof, found that the stipulation was a false stipulation, and that the case and proceedings of *Burke* v. *Kleiman* were collusive and fraudulent, and that the whole case was tainted with fraud (R. 84, 193). The affidavit (R. 203-6) executed by Fred L. Helman, the individual who attempted to create the restrictive agreement, shows that as early as February 1, 1929, which was three and a half years prior to the filing of the suit of *Burke* v. *Kleiman,* it was known by the Woodlawn Property Owners Association and its officials of which said Fred L. Helman was the executive secretary, that the alleged restrictive agreement was invalid according to its own terms, because the required frontage consents had not been obtained (R. 203-6). The record shows that the same Fred L. Helman, at Notary Public, took the acknowledgment of Olive Ida Burke to the complaint in the case of *Burke* v. *Kleiman* (R. 229-230). Helman's affidavit shows that it was known, at the time of the filing of said suit (October, 1932) by him and other officials of the Woodlawn Property Owners Association, that said restrictive agreement was invalid and had never come into force and effect according to its own terms, and that this knowledge was acquired three and a half years prior thereto.

Helman's affidavit likewise shows that he conferred with various officials of the Woodlawn Property Owners Association in regard to the filing of said case of *Burke*

v. *Kleiman,* and that he directed or caused to be paid to the attorneys representing Olive Ida Burke, the court costs for the filing of said case, and that he generally supervised the prosecution of said case up to the year 1933 when he severed his connection.

The decree in *Burke* v. *Kleiman* makes no mention of any representative or class suit (R. 236-246). Nor does the Appellate Court on appeal make any reference to its being a representative or class suit. (277 Ill. App. 519, 189 N. E. 372.)

In spite of the finding that the case and proceedings in *Burke* v. *Kleiman* were tainted with fraud and collusion, Chancellor Bristow in the *nisi prius* court, nevertheless reluctantly sustained the respondents' plea of *res judicata* (R. 191, 194) and thereupon in his decree (R. 72-88) sustained the objections of the respondents to the petitioners' answers and proceeded to declare the conveyance to the Hansberrys, void, and directed that upon the failure of the Hansberrys to convey their property to a white person, that a Master in Chancery of the court convey the same to Jay B. Crook, but said decree (R. 88) in no manner whatsoever provided for compensation to the Hansberrys. The chancellor enjoined Burke from selling or leasing any real estate within the alleged restrictive area to Negroes or to white persons for the purpose of selling or leasing to Negroes; enjoined Katz from selling or leasing his building at 6018 Vernon Avenue to Negroes; enjoined Pace and the Supreme Liberty Life Insurance Company from making any further loans on the real estate in the restricted area.

Inasmuch as a freehold was involved, the petitioners appealed directly to the Supreme Court of Illinois, being the highest court of the State. The Supreme Court of Illinois affirmed the judgment of the Circuit Court of

Cook County and thereupon, after denial of petition for rehearing, petitioners on March 11, 1940, filed a petition for certiorari in this Court to review the judgment of the Supreme Court of Illinois. Certiorari was granted by this Court on April 22, 1940.

SPECIFICATIONS OF ERRORS.

The Supreme Court of Illinois erred:

1. In affirming the decree of the Circuit Court of Cook County, Illinois, which found the case of *Burke* v. *Kleiman* to be a representative or class action, and in sustaining said decree as *res judicata* against the petitioners in the instant case.

(a) In affirming the decree of the Circuit Court of Cook County, Illinois, which found that *Burke* v. *Kleiman* was a class suit, although it found also that there never was a valid agreement and never in fact any class, and as a consequence, erred in sustaining the plea of *res judicata* on the basis of the decree of *Burke* v. *Kleiman*.

(b) And erred in not finding that the decree of *Burke* v. *Kleiman* was fraudulent, void, and entered without jurisdiction to bind any of the parties thereto or the petitioners.

2. In sustaining the plea of *res judicata* upon the basis of a decree and proceedings fraudulently and collusively brought and obtained.

3. In enforcing the harsh, oppressive and discriminatory restrictive agreement in deprivation of the petitioners' rights and property without due process of law, thereby denying the equal protection of the laws and abridging their privileges and immunities in violation of the 14th Amendment to the United States Constitution.

4. In enforcing the restrictive agreement against the petitioners in violation of Section 1977 and 1978 of the Revised United States Statutes.

5. In affirming the decree which deprived the Hansberrys of their property without compensation, in violation of their rights to due process of law under the 14th Amendment to the Federal Constitution.

6. In affirming the decree enjoining Israel Katz in an arbitrary and capricious manner, and without any evidence whatsoever, in deprivation of his rights and property without due process of law in violation of the 14th Amendment to the Federal Constitution.

7. In affirming the decree which enforced a harsh, oppressive and discriminatory restrictive agreement, which is against the public policy of the United States as expressed in Sections 1977 and 1978 of the Revised United States Statutes, the Federal Bill of Rights and the 14th Amendment, and which is likewise contrary to the natural and inalienable rights of the petitioners as citizens of the United States, contrary to the general welfare, and contrary to the aims, purposes and objects and the Federal Constitution as expressed in its preamble to the 14th Amendment.

8. In affirming the decree enjoining Supreme Liberty Life Insurance Company, mortgagee, and Harry H. Pace, sued as its president, from making mortgage loans in said restricted area, although the agreement sought to be enforced expressly exempts mortgagees from its operation.

SUMMARY OF THE ARGUMENT.

I.

The affirmance by the State Supreme Court of the decree of the trial court in its wrongful application of the doctrine of *res judicata* denied the petitioners the benefit of notice in the instant suit and a real opportunity to appear, to be heard, and to defend, and so deprived each of the petitioners of his property without due process of law and denied to each of them the equal protection of the laws.

A.

The case of *Burke* v. *Kleiman,* held by the State Supreme Court to be a class or representative suit and *res judicata* against all the petitioners as to execution, acknowledgment and compliance with the conditions precedent to the restrictive agreement coming into effect, was not a class or representative suit. The case was one in which one property owner was suing another property owner to enforce the agreement to the injury and detriment of the latter and where there was a dispute, conflict of interest and diversity of opinion as to the enforcement of the agreement.

A property owners' restrictive agreement between 500 or more different owners owning 500 or more different and dissimilar parcels of real estate cannot be the subject matter of a class or representative suit, there being no common subject matter and no identity of interest among them.

The issue as to whether a property owner is bound is as to each inherently personal in respect to individual

execution and acknowledgment, and in respect to which no property owner can be represented.

In particular, among the personal defenses available to each owner in respect to the instant restrictive agreement was the defense that the undertaking of the owner was that he should not be bound unless the owners of 95 per cent of the frontage joined in the agreement. This personal defense is foreclosed by the use of the representative suit device.

A representative or class suit if permitted and sustained in such a case would destroy essentially these personal defenses, namely, forgery of signatures, fraud and trickery in obtaining signatures, alteration of the instrument, laches, waiver, abandonment, estoppel, and change in the character of the neighborhood in respect to each individual property owner which would render inequitable the enforcement of the purported agreement.

B.

The purported agreement involved in *Burke* v. *Kleiman* and in the instant suit provided that it was to be null and void and of no force and effect unless signed, sealed and acknowledged by the owners of 95 per cent of the frontage. The proof in the instant case, as found by the trial chancellor, showed that this condition precedent to validity was not complied with; consequently, no agreement ever came into force or effect and there was no class to be represented by anyone. The court had no jurisdiction to bind the petitioners and their privies who were not parties and not served with summons or process in said cause. The decree of *Burke* v. *Kleiman* was therefore void and could not be pleaded as *res judicata* against these petitioners.

II.

The petitioners were deprived of their rights and property without due process of law by the judgment of the Supreme Court of the State of Illinois in sustaining the decree of the lower court which applied against the petitioners as *res judicata* the case of *Burke* v. *Kleiman,* the proceedings and decree, in which were fraudulently and collusively brought and maintained as found by the trial chancellor.

There was fraud going to the jurisdiction of the court in the very basic and essential allegation that there was a valid agreement that had actually been signed by the necessary owners of 95 per cent of the frontage, and fraud in the jurisdictional allegation that there was a class to be represented when, in fact, no such class ever existed. Moreover, the said proceedings were fraudulently maintained by means of a false stipulation of facts that the required frontage consent had been obtained.

The false stipulation of facts was preceded by stipulation of counsel in said cause that a stipulation of fact would be entered into in lieu of evidence and the case tried upon the pleadings without the necessity of any proof of any sort.

Such a fraudulent proceeding and decree cannot be *res judicata* against anyone.

III.

The decree of the State Courts which deprived the Hansberrys of their property without compensation was so arbitrary and contrary to law as to amount to a mere spoliation in violation of their rights to due process of law under the 14th Amendment to the Federal Constitution.

A.

The effect of the decree was to take property away from the petitioners, Hansberrys, and give it to Crook, their predecessor in title and an alleged co-conspirator with them, without compensation.

(1) Due process under the Fourtenth Amendment includes the proposition that property shall not be taken from one person by State action, whether legislative, judicial or executive, and given to another, without compensation.

IV.

The decree of the State Courts enjoining Israel Katz, having been entered without any evidence whatsoever, is so plainly arbitrary and contrary to law, as to amount to a mere spoliation of the petitioner Katz and as a consequence was an arbitrary and capricious judicial seizure of his property and a denial of his rights without due process of law in violation of the 14th Amendment to the Federal Constitution.

V.

The decree enjoining Supreme Liberty Life Insurance Company, as mortgagee, and Harry H. Pace, sued as its president, was manifestly erroneous and so unreasonable and arbitrary as to deny these petitioners of their rights and property without due process of law, particularly in that the agreement sought to be enforced specifically exempted mortgagees from its operation.

VI.

The enforcement by the courts below of a restrictive agreement which prohibits Negroes from owning property on account of race or color, is State action within the meaning of the Fourteenth Amendment and therefore is in violation of said Amendment, in that it is a deprivation of rights and property without due process of law and constitutes a denial of equal protection of the laws.

A.

If the legislative branch as an arm of the State cannot separate persons in neighborhoods on the basis of color or race, as was held in the case of *Buchanan* v. *Warley*, 245 U. S. 60, it follows that the judicial branch as an arm of the State cannot do so.

B.

The enforcement of the restrictive agreement by the courts below abridges the rights, privileges and immunities of petitioners as citizens of the United States in violation of the Fourteenth Amendment.

ARGUMENT.

I.

The affirmance by the State Supreme Court of the decree of the trial court in its wrongful application of the doctrine of res judicata denied the petitioners the benefit of notice in the instant suit and a real opportunity to appear, to be heard, and to defend, and so deprived each of the petitioners of his property without due process of law and denied to each of them the equal protection of the laws.

Postal Cable Telegraph Co. v. *Newport,* 247 U. S. 464 at 476.

Brinkerhoff-Faris Trust and Savings Co. v. *Hill.* 281 U. S. 673, at 679-682.

Chase National Bank v. *Norwalk,* 291 U. S. 431.

Windsor v. *McVeigh,* 93 U. S. 274 at 277.

The application of the doctrine of *res judicata* against the petitioners in this cause is in direct opposition to the requirements of due process of law.

In *Postal Cable Telegraph Co.* v. *Newport,* 247 U. S. 464, at 476 the court says as follows:

> "The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privy, litigated, or has had an opportuity to litigate, the same matter in a former action in a court of competent jurisdiction. *Southern Pacific Railroad Company* v. *U. S.,* 168 U. S. 1, 48 Greenleaf Evidence, paragraph 522-523. The opportunity to be heard is an essential requirement in due process of law in judicial proceedings. *Windsor* v. *McVeigh,* 93 U. S. 274, 277; *Louisville & Nashville*

Railroad Company v. *Schmidt*, 177 U. S. 230, 236; *Simon* v. *Craft*, 182 U. S. 427, 436. And as a state may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (*Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34, 46; *Coe* v. *Armour Fertilizer*, 237 U. S. 413, 423), so it cannot without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor a privy with a party therein."

See also:

Brinkerhoff-Faris Trust and Savings Co. v. *Hill*, 281 U. S. 673, at 679-682.

Chase National Bank v. *Norwalk*, 291 U. S. 431.

Windsor v. *McVeigh*, 93 U. S. 274 at 277.

A.

The case of Burke v. Kleiman, held by the State Supreme Court to be a class or representative suit and res judicata against all the petitioners as to execution, acknowledgment and compliance with the conditions precedent to the restrictive agreement coming into effect, was not a class or representative suit. The case was one in which one property owner was suing another property owner to enforce the agreement to the injury and detriment of the latter and where there was a dispute, conflict of interest and diversity of opinion as to the enforcement of the agreement.

In October, 1932, Olive Ida Burke (wife of James Joseph Burke, one of the petitioners herein) owning a parcel of property at 6039 Vernon Avenue, Chicago, Illinois, filed a suit in equity (R. 217, 218) purportedly on her own behalf and on behalf of all other property owners adversely affected by violation of the agreement there-

inafter mentioned. The case was merely one where one property owner, not a signer of the restrictive agreement, was suing another property owner, not a signer of the agreement, to enforce the purported restrictive ageement (R. 223, 224). There were no other property owners or signers made parties defendant in the case of *Burke* v. *Kleiman* nor named as parties plaintiff (R. 217, 218). Neither the petitioners nor any of their grantors were made parties to the proceeding of *Burke* v. *Kleiman*. There was no notice by publication or otherwise given to any of the other 500 or more property owners or signatories to the said alleged restrictive agreement (R. 218, 228-229). The only property involved was the property of Isaac Kleiman at 417 E. Sixtieth Street (R. 224-223). The suit filed by Olive Ida Burke against Isaac Kleiman and the other defendants had for its object the enforcement of an alleged restrictive agreement. The prayer of the complaint merely sought to enforce the agreement against the defendant Kleiman's property at 417 E. Sixtieth Street, Chicago, Illinois; it did not seek to have the alleged agreement declared valid, binding and effective as to the other property, nor as to any other parties (R. 227-229).

The plaintiff, Olive Ida Burke, was suing Isaac Kleiman and was seeking relief against him and the other defendants in *a manner which would damage and injure Isaac Kleiman and the other defendants in respect to the property at 417 E. Sixtieth Street in which the defendants had an interest.* The plaintiff, Burke, could not in any sense represent the defendant, Kleiman, for the reason that the plaintiff, Burke, desired to enforce an agreement and the defendant, Kleiman, adversely desired *not* to enforce said alleged agreement; and there was a sharp conflict, difference, and diversity of interest and opinion

between the plaintiff on the one hand and the defendants on the other in respect to renting and selling property to Negroes. The case of *Burke* v. *Kleiman* could not possibly be a representative suit or class action for the reason that if it were such, there would be an anomalous situation where one member, Burke, of a class, would be suing another member, Kleiman, of the same class and representing him in the same suit. In other words, in actuality, the plaintiff, Burke, was not representing the defendant, Kleiman, in respect to any common *res* or common subject matter or common right or title for the benefit of all involved, but on the contrary was engaged in a supposed dispute involving a difference and diversity of interest, and conflict of interest between the plaintiff, Burke, and the defendant, Kleiman, on the matter of leasing the *one* parcel of property involved, owned by the Kleimans, to Negroes or colored people (R. 218-229). Because of the sharp conflict of interest between the parties in the case of *Burke* v. *Kleiman,* that case could not possibly be a representative or class action, and since neither the petitioners nor any of their grantors were parties to that action, nor served with summons or process, the decree of *Burke* v. *Kleiman* could not, in the absence of the petitioners or their grantors bind, conclude, and estop the petitioners or their grantors; and both the trial court and the Supreme Court of Illinois erred in finding that decree binding, thereby depriving the petitioners of their rights and property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

This Court in the case of *Fayerweather* v. *Ritch,* 195 U. S. 276, had this to say in reference to the application of the principle of *res judicata*—page 276:

> "In *Chicago Burlington Railroad* v. *Chicago,* 166 U. S. 226, we held that the judgment of a State court

> might be here reviewed if it operated to deprive a party of his property without due process of law, and that the fact that the parties were purportedly brought into court and admitted to make defense was not absolutely conclusive upon the question of due process. We state: 'But a State may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the Statute prescribing forms of procedure in the courts and give the parties in interest the fullest opportunity to be heard and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment has said: "Can a State make anything due process of law which by its own legislation chooses to declare such?" To affirm this is to hold that a prohibition to the States is of no avail or has no application where the invasion of private rights is effected under the forms of said legislation.' *Davidson* v. *New Orleans*, 96 U. S. 97, 102. The same question could be propounded and the same answer should be made in reference to judicial proceedings."

It is clear that the application of the principle of *res pudicata* necessarily involves decision as to whether or not the parties before the court in the case in which the principle is sought to be applied, have had notice and a fair opportunity to defend in former proceedings. It is clear, consequently, that this Honorable Court in protecting the rights of citizens to due process of law under the Fourteenth Amendment will review the applications of the principle of *res judicata* by state courts.

It is of course necessary that the court be especially vigilant in its review of state court applications of the principle of *res judicata* where the former proceedings sought to be used are purportedly representative suits. This court in the case of *The Wabash Railroad Company* v. *Adelbert College*, 208 U. S. 38 at page 58, has sounded

a warning in respect to the doctrine of *res judicata* in representative suits. There the court said: "The theory of the plea in bar is that the *Ham* suit was a representative or class suit, and that the judgment in it bound all of the class, even if they were not parties or privies to it. It was held otherwise by the Circuit Court of Appeals with respect to this very judgment, *Compton* v. *Jesup*, 68 Fed. Rep. 263, and in that opinion we concur. * * * 'The allegation that the suit is brought in behalf of all who should join and share in the expenses cannot make the judgment binding on those who do not join. Some may have differed over jurisdiction and some perhaps could not join without disturbing the diversity of citizenship, upon which alone the jurisdiction was based, or some possibly had never heard of the pendency of the suit. It is clear if such suits in the Circuit Courts of the United States could have the effect claimed for them and the judgments in them are binding in our courts against all other persons of the same class, that injustice might result, and even collusive suits might be encouraged.'"

The holding of the *Burke* v. *Kleiman* suit to be a representative suit and *res judicata* against the petitioners, deprived the petitioners of the benefit of notice and a real opportunity to defend. In *Windsor* v. *McVeigh*, 93 U. S. 274 at 277, the Court says: "A denial to the party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had

been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."

A property owner's restrictive agreement between 500 or more different property owners owning 500 or more different and dissimilar pacels of real estate cannot be the subject matter of a class or representative suit, there being no common *res,* no common subject matter, and no identity of interest among them. In order to bring a representative suit there must be some common right, *res,* title or common subject matter or identical interest in all of the members of the class. See *Smith* v. *Swormstedt,* 16 How. 288 at 303; *Wabash Railroad Co.* v. *Adelbert College,* 208 U. S. 38 at pages 57-59; *Christoper* v. *Brusselback,* 302 U. S. 500 at 505; *Hale* v. *Hale,* 146 Ill. 227 at 258; *Weberpals* v. *Jenny,* 300 Ill. 157; *Saunders* v. *Poland Park Co.,* 198 Atl. 269.

The plaintiff who brings a class or representative suit must sue or defend for the benefit of *all.* A mere common interest in the question of *law or fact involved* is not enough upon which to base a representative or class suit. The fundamental principle in respect to the bringing and maintaining of class actions has been stated most forcibly by Pomeroy "Equity Jurisprudence," 4th Edition (1918), Volume 1, Section 268, page 498):

> "In that particular family of suits, whether brought on behalf of a numerous body against a single party, or by a single party against a numerous body, which are strictly and technically 'bills of peace,' in order that a court of equity may grant the relief and thus exercise its jurisdiction on the ground of preventing a multiplicity of suits, there does and must exist among the individuals composing the numerous body, or between each of them and their single adversary, a common *right,* a community of interest in the *subject matter of the controversy,* or a common *title* from which all their separate claims and all the questions

> at issue arise; it is not enough that, the claims of each individual being separate and distinct, there is a community of interest merely in a *question of law or of fact* involved, or in the *kind and form of remedy* demanded and obtained by or against each individual".

See: *Scott* v. *Donald*, 165 U. S. 107 at page 115 to 117, in which the language of Mr. Justice Nelson in the case of *Cutting* v. *Gilbert*, 5 Blatchford 259, 261 is quoted as follows:

> " 'This is a bill of peace to quiet the rights of parties, and put an end to further litigation. The bill is founded on the idea that all persons in business as brokers or as bankers doing business as brokers, charged with the tax in question, have such a unity or joinder in interest in contesting it, that all may join in the bill for that purpose; and that as the parties are so numerous as to make it inconvenient to join all of them, a determinate number may appear in the name of themselves and for all the rest. I have not been able to concur in this view. The interest that will allow parties to join in a bill of complaint, or that will enable the court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only an interest in the question but one in common in the subject matter of the suit' ".

It is necessary again to observe that in the *Burke* v. *Kleiman* case, a purportedly representative suit applied as *res judicata* by the Illinois Supreme Court against the petitioners, one party, not a signer of the alleged agreement, was suing another party, not a signer of the alleged agreement, to enforce the same agreement. (R. 218-219.)

A property owner's restrictive covenant, which involves 500 or more different owners owning dissimilar parcels of real estate, all of which are differently situated,

some with mortgages upon them, and some free and clear of encumbrances, some heavily burdened by taxes, and some not, some large, and some small, some homes and residences and some apartment buildings and commercial properties, some owned by private individuals and others by banks and insurance companies, some close to and adjacent to colored people and some far away, some owned by minors, guardian or trustees, some owned by hotels or inns under the statutory duty imposed by the Civil Rights Act of the State of Illinois to admit all persons without regard to race or color, some owned by hospitals under a like statutory duty to admit all persons, some wishing to enforce the agreement and others not, inherently cannot be the subject matter of a representative or class action, because there can be no common or identical interest between the property owners, and because instead of one common subject matter, there are 500 or more different subject matters, and 500 or more measures of damages in respect to each alleged violation of the covenant.

In the instant case, the Supreme Court of Illinois affirmed a decree which held a suit to be representative where the plaintiff Burke was suing another member of a class whom the plaintiff purported to represent. An allegation in a complaint, that a plaintiff brings the action on behalf of himself and all others similarly situated, does not in itself make an action a class suit. See *Wabash Railway Co.* v. *Adelbert College*, 208 U. S. 38 at 57-59; *Hammer* v. *New York Railway Co.*, 244 U. S. 266 at 273.

The issue as to whether a property owner is bound is as to *each*, inherently personal in respect to individual execution and acknowledgment, in respect to which latter facts *no property owner con be represented.* Among the personal defenses available to *each owner* in respect to

the instant restrictive agreement, was the defense that the undertaking or promise or covenant of the owner was that he should be bound *only if the owners of 95% of the frontage joined in the purported agreement.*

A representative or class suit if permitted and sustained in a restrictive covenant suit involving 500 or more parcels of property and 500 or more different owners would destroy essentially all the personal defenses to which each owner is entitled, namely: forgery of signatures, fraud and trickery in obtaining signatures, signing upon the condition that a certain number of other owners would sign, alteration of the instrument, laches, waiver, abandonment, estoppel, and change in the character of the neighborhood which would render inequitable the enforcement of the purported agreement. Each individual party signatory is entitled to prove as to these, not only in respect to himself but in respect to all other purported parties signatory, by whom and with whom he is sought to be bound. He is entitled to require proof of or to disprove the existence of the agreement.

The wrongful application by the Illinois Supreme Court and by the lower court of the doctrine of *res judicata* against the petitioners herein deprived the petitioners of their rights and property without due process of law in violation of Section 1 of the 14th Amendment to the Federal Constitution because the wrongful sustaining of the respondents' plea of *res judicata* on the theory of a supposed representative or class suit prevented these petitioners from utilizing the above mentioned personal defenses to which each owner was lawfully entitled under the laws of the State of Illinois, and as a consequence the petitioners were wrongfully deprived of notice and a real opportunity to appear, to be heard, and to defend. The petitioners, as well, as a consequence were denied the

equal protection of the laws of the State of Illinois. See *Postal Cable Telegraph Co.* v. *Newport,* 247 U. S. 464 at 476; *Wabash Railroad Co.* v. *Adelbert College,* 208 U. S. 38 at 58; *Windsor* v. *McVeigh,* 93 U. S. 274 at 277; *Earle* v. *McVeigh,* 91 U. S. 503 at 507; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 at 679-682.

The effect upon the petitioners' rights to utilize the personal defenses available to them, and for that matter, upon the rights of any alleged parties signatory to a restrictive agreement, of the application of the principle of *res judicata* by means of the device of holding former proceedings to have been representative or class in character, is illustrated by the record in the instant case. The respondents' witness, Eva Sommerman, the predecessor in title of the petitioners' Hansberry, who owned the property involved in this suit at the time of the circulation of the alleged restrictive agreement among the property owners, testified that she signed the agreement, Plaintiff's Exhibit 5 (R. 315, 318), but stated upon cross-examination: "I don't know what an acknowledgment is. I didn't go through any formality of signing it or acknowledging it. I didn't take any oath in respect to it." (R. 92.)

The petitioner, Israel Katz, testified as follows: "My signature appears on page 19 of Plaintiffs' Exhibit 5, and never to my knowledge did I sign that document. I signed the sheet upon which my name appeared which was presented to me with 2 or 3 sheets of paper. A man told me he was getting up a list of signatures for the improvement of the neighborhood. He did not tell me he was a Notary Public, nor did he say anything about restrictions against the sale of my property. I am familiar with the manner of taking acknowledgments to deeds and nothing like that appeared. I know this sheet

wasn't a deed. When I signed it no one explained the contents of the instrument to me, nor did the man who presented the instrument say anything about any agreement." (R. 172.)

The record in the State Supreme Court shows innumerable instances (which were pointed out both to the lower court and the Illinois Supreme Court) where the individual purported parties signatory could have made substantial defenses in suits brought against them individually to enforce the agreement, such as, their purported obligation under the instrument, including such defenses as erasures, forgery, fraud and trickery in obtaining signatures; lack of authority of purported agents, officers of corporations, trustees with testamentary or other powers, guardians, minors, and the like; lack of the required statutory personal knowledge of the Notary Public as to the identity of the signer and of the signer as the owner of the identical property involved. (R. 92, 93, 96, 145, 159-171, 172, 185-188, 203-4.)

It is well worth observing that the defense of improper acknowledgment in the instant case was available to each of the parties signatory by reason of the fact that the purported signatures to the agreement are *wholly unconnected and separated from the purported acknowledgments* which do not appear and are not attached to the *same* document or paper upon which the signatures appear. (R. 315-325.) (Note—there were four exhibits, Plaintiff's Exhibits 5, 5a, 5b and 5c, recorded respectively as 9914711, 9914713, 9914714, 9914712; R. 144, 142-145.)

The petitioners in this cause, and *ipso facto* all other purported parties signatory to the purported restrictive agreement, were by application of the doctrine of *res judicata* through the *Burke* v. *Kleiman* proceeding precluded from the defenses hereinabove set out. The trial

court overruled the objections of the petitioners to the admission of Plaintiffs' Exhibit 5 and, as well, concluded the petitioners against proof, in the decree of the court overruling said objections as aforesaid and applying the doctrine of *res judicata,* and thereby denying the petitioners due process of law and the equal protection of the laws.

The personal defenses hereinabove discussed are as a matter of state law available in the trial of civil cases involving contracts in the courts of the State of Illinois. They are a part of the common law adopted by most of the states of the Union. Reference is made to the Notes and Comments upon the decision of the State Supreme Court now being reviewed in this cause. See University of Chicago Law Review, Vol, 7, No. 3 (April, 1940) Pages 563-567; Illinois Law Review, Vol. 25 (June, 1940) No. 2, Pages 213-218.

The peculiarly personal defenses available to each purported signer cannot be determined in a representative or class proceeding and no signer to any such restrictive agreement can be represented by any other signer in respect to such defenses personal to each signer. See *Christopher* v. *Brusselback,* 302 U. S. 500 at 504-5. The provision in the purported agreement to the effect that "This agreement and the restrictions herein contained shall be of no force or effect unless this agreement or a substantially similar agreement shall be signed by the owners above enumerated of 95% of the frontage above described" and other conditions precedent contained therein, emphasize the retention of the right by each individual signer to contest the validity of the agreement in every respect. The agreement contained no power to confess a judgment or decree.

It is a well settled principle of law as announced by

this court in numerous cases that mere numerousness of parties is not sufficient for the bringing and maintaining of a representative or class suit. See *Matthews* v. *Rodgers*, 284 U. S. 521 at 529-30; *Hale* v. *Allinson*, 188 U. S. 56 at 77, *et seq.*; *St. Louis Iron Mountain and Southern Ry. Co.* v. *McKnight*, 244 U. S. 368 at 375; *Kelley* v. *Gill*, 245 U. S. 116 to 120.

We respectfully call to the attention of the court the statement of Mr. Justice Shaw in his dissenting opinion to the decision of the Illinois State Supreme Court now on review in this court as follows:

> "The opinion in this case states that the defendants were so numerous that it would have imposed an unreasonable hardship and burden to make them all parties to the suit. This is a definite overruling of *Whitney* v. *Mayo*, 15 Ill. 251. It is true that there were 500 defendants, but even the humblest of these 500 had a right to his day in court, to be made a party to the suit and to be given an opportunity to defend it. Their names were on the public records of Cook County and not the slightest excuse appears for not making them parties to the suit. If one sought to bind all the property in the City of Chicago by some restrictive covenant he would assume the burden of making every property owner in that city a party to the suit, either by name or as unknown owner, if he was, in fact, unknown. He could not gain an advantage for himself through a fraudulent scheme simply by saying they were too numerous to mention." (R. 333-4.)

B.

The purported agreement involved in Burke v. Kleiman and in the instant suit provided that it was to be null and void and of no force and effect unless signed, sealed and acknowledged by the owners of 95 per cent of the frontage. The proof in the instant case, as found by the trial chancellor, showed that this condition precedent to validity was not complied with; consequently, no agreement ever came into force or effect and there was no class to be represented by anyone. The court had no jurisdiction to bind the petitioners and their privies who were not parties and not served with summons or process in said cause. The decree of Burke v. Kleiman was therefore void and could not be pleaded as res judicata against these petitioners.

The trial chancellor Bristow, found that the restrictive agreement involved in this case and in *Burke* v. v. *Kleiman*, was an invalid agreement because the required frontage consent of the owners of 95% of the frontage had never been obtained, but only 55%. (R. 191-199.) Although the Chancellor found that the condition precedent of frontage consent of 95% had never been complied with, he nevertheless enforced the non-existent restrictive agreement (invalid and non-existent according to its own terms) by holding and finding that the case of *Burke* v. *Kleiman* was a representative or class action, and therefore, all the defenses, such as lack of due and proper execution, failure to comply with the condition precedent in the instrument, fraud and trickery in the obtaining of signatures, alteration of the instrument and the erasure of names, laches, abandonment, estoppel and change in the character of the neighborhood, all raised by the petitioners herein, were

precluded and could not be properly raised by the petitioners, because the plea of *res judicata* was properly invoked by the respondents.

In the instant case (and in the case of *Burke* v. *Kleiman*) the court made an agreement for the parties and specifically enforced a non-existent agreement by specific performance and granted a harsh mandatory injunction against the petitioners Hansberry, although neither the petitioners nor their privies, had been parties to the proceedings of *Burke* v. *Kleiman,* nor served with summons, process or notice in said cause.

The record in this case affirmatively shows that the court never acquired jurisdiction in the case of *Burke* v. *Kleiman* over any subject matter of that lawsuit, because there was in fact no restrictive agreement whatsoever according to the terms of the instrument purported to be enforced by the decree of *Burke* v. *Kleiman.* The court had no authority, right or jurisdiction whatsoever to enforce an agreement which did not exist, and the judgment and decree in the case of *Burke* v. *Kleiman* is therefore void for want of jurisdiction, and such a void judgment or decree could not be pleaded as *res judicata* against the petitioners herein. See *Scott* v. *McNeal,* 154 U. S. 34 at 48 to 51.

In the case of *Scott* v. *McNeal,* this court held that a probate proceeding upon a *living person* was void for want of jurisdiction, and that to give effect to such a proceeding even in the name of a State was a denial of due process of law. Similarly, the courts of the State of Illinois had no jurisdiction whatsoever to enforce a non-existent restrictive agreement, there being no *subject matter* upon which the jurisdiction of any court might attach. See *Galpin* v. *Page,* 18 Wall, 350 at 365 and 366; *Old Wayne Life Association* v. *McDonough,* 204 U. S. 8 at pages 14-18, 22 and 23.

The record of *Burke* v. *Kleiman* itself affirmatively establishes the invalidity of the judgment or decree in that case. The complaint in the case of *Burke* v. *Kleiman* states that "said agreement was signed by the *owners of 95 percentum of the frontage described therein*". There was no evidence taken in said cause, but the attorney for the plaintiff, Olive Ida Burke, and the alleged attorney (but wholly unauthorized as will be shown by the record (R. 171), for the defendants), stipulated that the cause be heard upon agreed facts to be stipulated without the necessity of taking oral evidence (R. 185). In accordance with this stipulation, another stipulation of agreed facts was executed with the same lack of authority by the same attorneys, and said stipulated or agreed facts *merely* recites the following: "That, on, to-wit, the 30th day of September, 1927, about five hundred or over white persons duly executed and entered into a restrictive agreement described in the bill of complaint herein, *said white persons constituting and comprising more than the 95% of the then owners of said frontage described in said agreement*". (R. 236-243.) The decree in the case of *Burke* v. *Kleiman* merely recites the foregoing statement to the effect that the agreement had been signed by *95% of the owners.* (R. 236.) The decree in *Burke* v. *Kleiman* (R. 263 to 246), likewise finds *that the stipulated facts constituted the evidence* in the cause of *Burke* v. *Kleiman.* (R. 243.) The stipulated or agreed facts (R. 236) fail to show that *95% of the owners* executed the agreement. The decree of *Burke* v. *Kleiman* merely shows that *95% of the owners* executed the agreement. (R. 236.) Consequently, the proceedings and decree in the case of *Burke* v. *Kleiman* show and prove affirmatively upon their face the entire and complete lack and want of jurisdiction in the court to enter any decree enforcing any agreement. There is a complete

lack of facts and findings in the stipulated agreed facts or in the decree to establish the central and prime allegation in the complaint (R. 223) to the effect that the owners of 95% executed the agreement.

It is quite easy to see that 95% of the owners of the area might not own 95% of the frontage, or to state it another way, that 95% of the owners might own only 50% or 60% of the frontage. In the light of the fraud and collusion in the case of *Burke* v. *Kleiman,* as shown by the record in this case (as hereafter shown), the court can easily see that the recital in the stipulated or agreed facts that 95% of the owners executed the agreement, was not a mere inadvertence.

It has always been held by this court that a judgment void for want of jurisdiction may be collaterally attacked at any time and in any court. See *Galpin* v. *Page,* 18 Wall. 350 at 366 and 367. In order to render a valid judgment, a court must have jurisdiction of the subject matter as well as the parties. In the case of *Burke* v. *Kleiman* there was entire lack of jurisdiction over any subject matter, there being in fact no agreement whatsoever to enforce. This court has held that presumptions will not be indulged in to supply a proper or valid subject matter or jurisdictional facts where the evidence and record in the case show that the contrary appears. This rule of law has been stated by Justice Field in the case of *Galpin* v. *Page,* 18 Wall. 350 at 366, where the following language was used:

> "But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration

> when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred."

The proceedings, that is, the stipulation and agreed facts and the decree containing said stipulated and agreed facts in the case of *Burke* v. *Kleiman* affirmatively shows the entire absence of a restrictive agreement, which depended for its validity upon the compliance with the condition precedent contained therein, namely: Execution of the instrument by the owners of 95% of the frontage. No presumption can be indulged in to supply the absence of the finding of compliance with the condition precedent in the instrument, which could not become an agreement until the owners of 95% had signed, sealed, executed and delivered the same. The void judgment and decree in the case of *Burke* v. *Kleiman* could not be pleaded against the petitioners as *res judicata.* See *Thompson* v. *Whitman,* 18 Wall. 457 at 468 to 470; *Old Wayne Life Association* v. *McDonough,* 204 U. S. 8 at Pages 14 to 17, 22 to 23.

II.

The petitioners were deprived of their rights and property without due process of law by the judgment of the Supreme Court of the State of Illinois in sustaining the decree of the lower court which applied against the petitioners as res judicata the case of Burke v. Kleiman, the proceedings and decree in which were fraudulently and collusively brought and maintained, as found by the trial chancellor.

There was fraud going to the jurisdiction of the court in the very basic and essential allegation that there was a valid agreement that had actually been signed by the necessary owners of 95 per cent of the frontage, and fraud in the jurisdictional allegation that there was a class to be represented when, in fact, no such class ever existed. Moreover, the said proceedings were fraudulently maintained by means of a false stipulation of facts that the required frontage consent had been obtained.

The false stipulation of facts was preceded by stipulation of counsel in said cause that a stipulation of fact would be entered into in lieu of evidence and the case tried upon the pleadings without the necessity of any proof of any sort.

Such a fraudulent proceedings and decree canot be res judicata against anyone.

The Chancellor in the lower court who heard and considered all of the evidence in respect to the fraudulent and collusive character of the *Burke* v. *Kleiman* suit, found that the suit was a fraudulent and collusive proceeding conducted to establish the invulnerability of the district, that to make the district unassailable the suit was

brought to test the validity of the agreement and to have judicial determination of that fact. (R. 192-193.)

We can follow the fraud in connection with the attempt to establish this invalid agreement as valid in law, in sequence by the record before this court.

One Helman, was the Executive Secretary of the Woodlawn Property Owners' Association, the Association organized to promote and establish the agreement. (R. 142, 203.) He took most of the acknowledgments to the purported agreement. He had knowledge that the agreement had not come into effect by its terms. He supervised the institution and filing of the *Burke* v. *Kleiman* proceedings. All of these facts are set out and shown in an uncontradicted affidavit filed in this cause in support of a motion and petition of the petitioners to vacate and set aside the decree in this cause, all of which were a part of the record before the Illinois Supreme Court at the time that it reviewed and affirmed the proceedings and decree of the lower court.

Helman, who had knowledge that the agreement was invalid, took the acknowledgment to the complaint which Olive Ida Burke made upon information and belief. (R. 203, 204, 229-30.)

Perfunctory answers were filed on behalf of all the defendants, and in none of the answers was issue taken upon the due execution and acknowledgment of the agreement sued upon or upon compliance with the condition precedent contained therein. (R. 230-235.)

Isaac Kleiman, and James Lowell Hall, testified that they did not employ any lawyers to represent them (R. 171-172), and had not authorized any lawyer to sign a stipulation in their behalf. Notwithstanding, a stipulation was entered into by Charles J. Sopkin, a lawyer and

one of the defendants, in behalf of all the defendants, with the attorney for the plaintiff, that the case should be tried on a stipulation of facts without the necessity of producing oral evidence. A stipulation was subsequently entered into stipulating facts to be considered as evidence, including the false stipulation as to the due execution and acknowledgment of the agreement and compliance with conditions precedent contained therein. The decree erroneously, consistent with the erroneous stipulation in the stipulated facts, found that 95% of the owners of said frontage had executed and entered into the agreement and not the owners of 95% of the frontage, as required by the agreement. The prayer of the plaintiff's complaint did not ask that the agreement be found valid, and the ordering part of *Burke* v. *Kleiman* decree merely enforced it against the named defendants. (R. 185, 227, 236-46.)

The fraudulent character of *Burke* v. *Kleiman* proceedings, under attack by the petitioners when pleaded by the respondents as *res judicata,* was patent from the pleadings in the *Burke* v. *Kleiman* case, and the evidence adduced in *Lee* v. *Hansberry* hearing.

There was no real controversy between the parties nominally opposed to each other, and the litigation was in fact carried on under the direction and control of the plaintiff and the Woodlawn Property Owners' Association and its employees engaged in conducting the project of establishing the restricted area and the invalid restrictive agreement.

It is well settled that this court will review applications of the doctrine of *res judicata* and this court is of course, especially diligent in its examination of the application of *res judicata* in respect to proceedings sought to be used

as *res judicata* and which bear hall-marks of fraud. See *Hatfield* v. *King,* 184 U. S. 162; *Geter* v. *Hewitt,* 22 How. 364.

This court has made a capital statement in respect to fraudulent and collusive suits. In the case of *Lord* v. *Veasie,* 8 How. 251, the court speaking through Mr. Chief Justice Taney in respect to a fraudulent suit, used the following language:

> "Page 253: The court is satisfied, upon examining the records of this case, and the affidavits filed and the motion to dismiss, that the contract set out in the pleadings was made for the purpose of instituting this suit, and that there is no real dispute between the plaintiff and the defendant. On the contrary, it is evident that their interest in the question brought here for decision, is one and the same, and not adverse; and that in these proceedings, the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to this suit, who had no knowledge of it while it was pending in the Circuit Court and no opportunity of being heard there in defense of their rights. And their conduct is the more objectionable because they have brought up the question upon a statement of facts agreed on between themselves, without the knowledge of the parties with whom they were in truth in dispute and upon a judgment *pro forma.* * * *"

The circumstances of fraud exhibited in *Burke* v. *Kleiman* proceeding illustrate the vice of holding suits and proceedings not truly representative in character as *res judicata* against persons without notice and a real opportunity to defend in respect to vital issues affecting their rights and property.

The Illinois State Supreme Court in its review of the proceedings in the instant cause, without modifying the decree of the lower court, stated that the charges of

fraud made by the petitioners were unsupported by the evidence. The opinion of the court referred to the fact that the charges were made in the answer of the petitioner, Burke, and that he appeared to have had part in the fraud, if any, in the *Burke* v. *Kleiman* proceedings. The affidavit of Helman, which was before the court at the time of its review of the lower court's proceedings, definitely showed that the *Burke* v. *Kleiman* proceedings were conducted under his and the Woodlawn Property Owners' Association's supervision. The record further showed that the plaintiff, Olive Ida Burke, was herself not a party signatory to the agreement, and that neither she nor Burke were necessarily informed of the fraud in the initiation of the agreement, its illegal recordation and the facts indicating fraud now exposed in the proceedings in the instant suit. (R. 218-247.) It should be noted that the answer of James Joseph Burke was under oath as true in substance and in fact and that the denial of the charges contained in the Burke answer was made in the reply signed by the attorneys for plaintiffs. (R. 43-49.)

Reference is made to the dissenting opinion of Mr. Justice Shaw in the instant case. *Burke* v. *Kleiman* proceedings were fraudulent and fraud attached to the jurisdiction of the court and tainted the entire proceedings, and so rendered the same void when attacked by the petitioners on the record as shown herein.

III.

The decree of the State Courts which deprived the Hansberrys of their property without compensation was so arbitrary to law as to amount to a mere spoliation in violation of their rights to due process of law under the 14th Amendment to the Federal Constitution.

The decree entered by the Chancellor in the trial court deprived the petitioners of their rights in the arbitrary seizure of their property by a Master in Chancery of the Superior Court of Cook County, Illinois. The result of this action was the forceful transfer of the property of one citizen to another. (R. 88.) That this harsh and oppressive action is violative of the Fourteenth Amendment is readily apparent. In support of this proposition note the case of *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, Pages 236, 237, to this effect:

> "The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be permitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

See also *Missouri Pacific Railway* v. *Nebraska*, 164 U. S. 403.

The mere formal due process cannot convert the action of the State Courts into constitutional procedure. Legislatures have come to learn that under ordinary circumstances property cannot be taken without compensation. *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226 at 241. If Legislatures are prohibited from arbitrarily seizing property, then the courts suffer the same regulations and prohibitions. To contend in the instant case that the Hansberrys had due process when their property was arbitrarily transferred to Jay B. Crook, would be a travesty. Crook was Hansberry's predecessor in title and an alleged co-conspirator. (R. 8.) The Court thus not only arbitrarily divested the Hansberrys of their title but reinvested title in Crook who had received good and valuable consideration. The arbitrary nature of the proceeding is further noted on an examination of the restrictive agreement which was the basis of the proceedings below. No where in the agreement is a forfeiture provided. (R. 316-317.)

If due process under the Fourteenth Amendment has any meaning, it certainly includes the proposition that property shall not be taken from one person by State action whether legislative, judicial or executive, and given to another without compensation, particularly as here, where the person to whom the property was given stood in the same position as the individuals who were divested of their title.

Chicago, Burlington & Quincy Railroad v. *Chicago*, 166 U. S. 226 at 233-234.

IV.

The decree of the State Courts enjoining Israel Katz, having been entered without any evidence whatsoever, is so plainly arbitrary and contrary to law, as to amount to a mere spoliation of the petitioner Katz and as a consequence was an arbitrary and capricious judicial seizure of his property and a denial of his rights without due process of law in violation of the 14th Amendment to the Federal Constitution.

The complaint of the respondents charged that the petitioner Katz, listed his property for sale with James J. Burke, and that he made threats to sell his property to colored people. Katz testified that he never at any time had any conversation with James J. Burke about the sale of his property at 6018 Vernon Avenue (R. 172-173) *and this fact was never rebutted in any manner whatsoever by the respondents.* The complaint also charged that Katz made threats to sell his property. (R. 12-13.) No threats by Katz whatsoever were ever proved. The respondents merely offered the following things as evidence of threats by Katz: That Katz was subpoenaed as a witness in a proceeding before the State Department of Registration and Education in February or July, 1937, according to respondents' witness Raymond (R. 122); that while testifying as a witness in this proceeding against William I. Sexton, a real estate broker, Attorney Harry E. Raymond, one of the attorneys for the respondents as shown by the record in this case, and one of the attorneys for the plaintiff in the case of *Burke* v. *Kleiman* asked Katz the following question: "Would you sell your property at 6018 Vernon Avenue to colored people, notwithstanding the agreement that is recorded in the particular district, Washington Park District, in which your prop-

erty is located, and in which you the owner, then owner of this property was a signer for yourself?" And Katz said: "Yes, I would. I would sell it to anybody that I could get to purchase it. I would sell it now if I could." This was not a threat, but was an answer elicited by the respondents themselves or their agents from a witness who was subpoenaed by them and who was answering a *hypothetical* question put by their attorney. In other words, the only evidence in the record as to any threat is a *privileged* statement made by the petitioner Katz, and *induced* by the respondents themselves while upon the witness stand in another proceeding in February, 1937, or July, 1937, as stated by the witness Raymond. (R. 122.) The witness Raymond was in utter confusion as to the date of this testimony by the petitioner Katz, and testified that it was made either February, 1937, which was at least four months prior to the filing of the injunction suit or in July, 1937, which would have been after the filing of the complaint in this cause, which was filed on June 7, 1937.

In other words, the supposed statement of Katz was not of such imminent or immediate pending nature that an injunction was necessary to protect the rights, if any, of the respondents. A substantial Federal right has been denied the petitioner Katz, and a decree of injunction has been issued against him without any real basis of evidence. In order to determine the violation of the Federal right asserted by the petitioner Katz, we submit that the court should examine the record for that purpose. See *Norris* v. *Alabama*, 294 U. S. 587 at 590; *Creswill* v. *Knights of Pythias*, 225 U. S. 246 at 261; *Traux* v. *Corrigan*, 257 U. S. 312 at 324-325.

The enforcement of the decree against the petitioner Katz, likewise deprived him of his fundamental rights

as a citizen of the United States to deal with property rightfully belonging to him. The harsh and injudicious manner in which his property rights were affected divested him in effect of his property in view of the change in the character of the surrounding neighborhood which made it impossible for the petitioner to use his property in a manner consonant with complete ownership. (R. 180-184.)

V.

The decree enjoining Supreme Liberty Life Insurance Company, as mortgagee and Harry H. Pace, sued as its president, was manifestly erroneous and so unreasonable and arbitrary as to deny these petitioners of their rights and property without due process of law, particularly in that the agreement sought to be enforced specifically exempted mortgagees from its operation.

Not having purchased any property in the area and having acted only in a manner entirely lawful and permitted even under the alleged agreement and being authorized under the laws of the State of Illinois to make mortgages on real estate, the arbitrary act of the court in applying the doctrine of *res adjudicata* was not merely erroneous but deprived the petitioner Supreme Liberty Life Insurance Co. of its substantial, substantive rights and seriously interfered with and hampered its competitive opportunities to make earnings from investments. Certainly the petitioners Pace and the Supreme Liberty Life Insurance Co. had the right to be heard on the question whether this alleged covenant had ever been executed by the owners of 95% of the frontage in the area involved, but the court denied them such right when it sustained the plea of *res adjudicata* interposed by respondents. Petitioners were charged with conspiring to violate a covenant, which by the evidence adduced at the trial was

shown conclusively and indubitably never to have existed. This was a direct denial of due process and we submit that such action cannot be contenanced by the highest tribunal of our nation.

Chicago, Burlington and Quincy v. *Chicago,* 166 U. S. 226.

VI.

The enforcement of the restrictive agreement by the courts below abridged the rights, privileges and immunities of petitioners as citizens of the United States in violation of the Fourteenth Amendment.

It is well settled that the prohibitions of the Fourteenth Amendment were designed to protect the newly emancipated Negro so that he would stand on an equal footing with all other American citizens before the law. Though the language is prohibitory, every prohibition implies the existence of rights and immunities, prominent among which is the imuunity from inequality of legal protection, either for life, liberty, or property. Any denial or abridgement of these fundamental immunities is certainly in conflict with the Constitution. (*Strauder* v. *West Virginia,* 100 U. S. 303, 308.)

That the prohibitions of the Fourteenth Amendment refer to all branches of the government is self-evident. *Chicago, Burlington and Quincy* v. *Chicago,* 166 U. S. 226, Mr. Justice Harlan speaking for the court in that case said on pp. 233, 234:

> "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name and

for the State, and is clothed with the States' power, his act is that of the State."

In the case at bar, the enforcement of the decree by specific performance and the subsequent seizure of the property of the petitioners Hansberry was state action in that the Chancellor and the Master in Chancery were properly constituted officers and agents of the State. See *Ex parte Virginia,* 100 U. S. 339; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 682; *Carter* v. *Texas,* 177 U. S. 4422. The use of the agencies of the state was contemplated by the framers of the restrictive agreement. It is not only provided that the courts of the state were to be used for purposes of enforcement but also that certain offices of the state were likewise to be utilized to breathe life into the instrument. The agreement provided that it should be of no force or effect unless it was recorded in the office of the Recorder of Deeds of Cook County, Illinois. (R. 316.)

That the enforcement of the restrictive agreement was state action cannot be doubted when the Chancellor in effect made himself an interested party to the extent of rewriting the instrument to include a forfeiture provisions that the framers did not intend. (R. 316.) This affirmative action, coupled with that of the Master in Chancery who executed the conveyance from Hansberry to Crook, effectively denied the petitioners their rights under the Fourteenth Amendment. This action creates a situation somewhat analogous to that in *Scott* v. *McNeal,* 154 U. S. 34, where the court held that a judgment of the highest court of a State, by which a purchaser at an administration sale, under an order of a probate court, acquired land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to

the Fourteenth Amendment. In the instant case, by a judgment of the lower court, affirmed by the highest court of the state, we find title to realty being taken by the state.

Unless by some superogation recently arrived at, if the state through the legislative branch cannot separate persons in neighborhoods on the basis of color or race, as was held in *Buchanan* v. *Warley,* 245 U. S. 60, it follows that the judicial branch as an arm of the state cannot do so. Such a decree by the judiciary would have all the force of a statute and would have behind it the sovereign power of the state. It would not be the plaintiffs in the case below speaking but the sovereign itself through the courts, telling the petitioners of a new law-making power that could invalidate and hold as a nullity a prior decision of this court. *Buchanan* v. *Warley, supra.* It would indeed be narrow and strained to deny the exercise of power to segregate races to the legislative branch on the one hand and permit the judicial on the other to give legal sanction to segregation. Such a course would be unsettling in the extreme at a time when the body politic can stand few more such extreme shocks.

The petitioners as citizens of the United States have a national citizenship that has been seriously impaired by the action of the state courts. Citizenship is dual in nature. An individual may be both a citizen of a state and also a citizen of the United States, but certainly the sta tes can in no wise impair the paramount national citizenship. Note the language of *Colgate* v. *Harvey,* 296 U. S. 404 at 427, where the court through Mr. Justice Sutherland stated:

> "Thus, the dual character of our citizenship is made plainly apparent. That is to say, a citizen of the United States is *ipso facto* and at the same time a citizen of the state in which he resides. And while

> the Fourteenth Amendment does not *create* a national citizenship, it has the effect of making that citizenship 'paramount and dominant' instead of 'derivative and dependent' upon state citizenship."

The action of the Chancellor in the instant case, as well as the activity of his Master in Chancery, in the enforcement of the decree ordering specific performance of the covenant and likewise depriving the petitioners Hansberry of their property, in effect reversed the true order of priority of citizenship. We have the situation of the state, through its duly constituted agents, issuing a mandate to citizens of the United States in a manner that sets back the orderly development of the constitutional law of both this country and of England. A right to live and a place in which to live are certainly two of the fundamental rights of man, each interdependent upon the other. If there is any meaning to the concept of citizenship, or to the idea of natural and inalienable rights, that meaning has been confounded and flaunted by the unnatural and unconstitutional action of the state courts.

To hold that free citizens cannot own property, or for that matter, can be restricted in the essential element of ownership, namely use(a distinction which Mr. Joseph Warren in 34 Harvard Law Review, 639 at 653, called specious) is to turn the clock back beyond the Statute of 13 Edward I. c. I., De donis, the Mortmain acts and the other splendid efforts to increase the free ownership and transfer of land.

If an ordinance forbidding the distribution of printed matter and the withholding of permits for public meetings in streets and other public places was unconstitutional (Haguev. C. I. O. 307 U. S. 496), then how much more offensive is the action of the state through its officers in the instant case in denying the right to live to

a people, compressed as they are on the south side of the City of Chicago, Illinois. (R. 181.)

CONCLUSION.

In the light of the propositions of law heretofore advanced and the arguments made in support thereof, we respectfully submit that the judgment of the Supreme Court of Illinois, affirming the judgment of the Circuit Court of Cook County, be reversed, set aside and declared for naught.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 29

CARL A. HANSBERRY, NANNIE L. HANSBERRY, *et al.*,

Petitioners,

vs.

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF OF PETITIONERS

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PETITION FOR CERTIORARI FILED MARCH 11, 1940.
CERTIORARI GRANTED APRIL 22, 1940.

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JURISDICTION.

The statement as to jurisdiction in respondents' brief is inaccurate in several respects.

The Petitioners argue not only that the decision of the Supreme Court of Illinois denies them due process of law under the 14th Amendment but, as well, that by the decision the State of Illinois has abridged the privileges and immunities of each and all of the Petitioners as citi-

zens of the United States and has denied to each and all of the Petitioners the equal protection of its laws.

The petitioners in their brief reply for reversal upon each and all of the grounds urged in their brief. The charge of Petitioners of the denial of due process of law by wrongful application of the doctrine of *res judicata* is based upon the denial of the fundamental requirements of due process of law, to-wit, notice, the benefit of notice, the right to appear and to a real opportunity to defend. These rights were denied the petitioners independently of the fraudulent jurisdictional character of the *Burke* v. *Kleiman* proceedings held as *res judicata* against the petitioners. By sustaining the *Burke* v. *Kleiman* proceedings as *res judicata,* and holding thereby that the said proceeding was a representative or class action, the Illinois Supreme Court erroneously deprived each and all of the petitioners of the benefit of notice in the case now on review and a real opportunity to defend.

The fraud going to the jurisdiction of the court in the *Burke* v. *Kleiman* proceedings in the allegations as to the existence of the agreement and that there was a class to be represented (which fraud persisted throughout the proceedings both in the lower court and the State Appellate Court by means of the procurement of the decree by a false stipulation of facts and pleadings collusively produced), constitute an independent ground for petitioners' claims of denial of due process of law. The petitioners rely principally upon each and all of the grounds urged, but certainly the error of the Illinois Supreme Court is the more flagrant in view of the patently fraudulent character of the *Burke* v. *Kleiman* proceedings.

All of the other grounds argued in the brief of the Petitioners are argued with equal earnestness by the Petitioners.

The assertion in the jurisdictional statement in Respondents' brief that "The application of the doctrine of *res judicata* is primarily a matter of the law of Illinois" and that "The question here is limited to whether there is evidence to support the findings below that *Burke* v. *Kleiman, supra,* was a decision in a class or representative action, reached in good faith and not fraudulent or collusive" is obviously erroneous. The issue here involved is whether the State has denied to each and all of the Petitioners due process of law, whatever may be the settled law of the State of Illinois. Equal protection of the laws is not necessarily due process of law. Partiality of the State Supreme Court in reversing its settled law of 100 years is raised by the dissenting opinion in the case now on review. (R. 333, 334.)

STATEMENT.

Inaccuracies in the "Statement" in the brief of respondent confuse the clarity of the issues presented by this review.

Essentially an alleged restrictive agreement containing an alleged mutual restrictive covenant is involved herein. This is not a case involving single and independent covenants affecting single and independent parcels of property; the covenants here are sought to be created by the agreement and the existence of each and all are dependent upon the existence of the agreement. (R. 3, 4.)

The respondents' brief does not point out where any proof appears in the record that the owners of 95% of the frontage executed the agreement, nor any showing in the record of computation of frontage by the Woodlawn Property Owners Association. On pages 11 and 12 of their brief the respondents state that they relied on

their plea of *res judicata* in respect to the *Burke* v. *Kleiman* proceedings, and *further,* on their objections to petitioners' computations, the affidavit of Charles A. Churan, counsel for Woodlawn Property Owners Association (also principal counsel for the respondents in the State courts in the case here on review), as to the frontage signed, the affidavit of George W. Cook, a director of the aforesaid association as to computations, their amended complaint which reduced the total frontage involved, and showing of additional signatures recorded after the recording date required by the agreement. Record citations as to these items are given. In respect to these, procedurally, the Petitioners were denied the right of cross-examination, and by the sustaining of the Respondents' plea of *res judicata* the Petitioners were deprived of the benefit of the evidence adduced in their behalf on these very points in respect to which Respondents claim the record shows proof in their behalf. The fact that the Respondents now state that they relied upon the evidence in the record before the State Supreme Court to support the lower court's decree, shows that the Petitioners were denied the right to defend as to matters opened for proof by the plaintiff-Respondents. And the decree with its finding that only 54% of the frontage signed the agreement, must be assumed to have been made in consideration of this showing in the record relied on by the Respondents as well as upon the evidence tendered by the Petitioners.

In respect to the cases stated by Respondents as involving the agreement sought to be enforced in this cause reference is made to the statement made by Petitioner Burke in his answer herein (R. 30, 32 and 33) showing that the existence of the agreement was never in fact proved. Reference is also made to the decree in *Cook* v. *Yondorf* (R. 299) showing that the property

therein sought to be bound was not held to be bound. Reference is also made to the decree in *Penoyer* v. *Cohn* (R. 301), showing the decree to be upon the default of all of the defendants. The record shows that the decree obtained in 1936 was never enforced. (R. 190, 301.)

The "statement" in respondents' brief abounds in prejudicially cited items in the record and it is inappropriate under these circumstances to correct the unfair inferences made therefrom by the respondents. We are confident that in our original brief an accurate, fair and impartial statement of the case has been made for the review by this court. Indeed, we believe that the citations referred to by Respondent in most instances emphasize the fair character of the Petitioners' statement of the case.

With regard to what the evidence tended to show in support of the trial Chancellor's finding that the *Burke* v. *Kleiman* proceedings were fraudulent, we respectfully submit that this record shows not only that the *Burke* v. *Kleiman* proceedings were fraudulently instituted and maintained, as especially exhibited by the character of the pleadings therein (R. 218-246), 185, but the whole of the transactions in respect to the alleged agreement involved in the case on review, have been fraudulent.

ARGUMENT.

I.

This Court will review the finding of facts by a State Court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

The above principle of law has been well settled by this Court in the case of *Kansas City Southern Railway Company* v. *C. H. Albers Commission Company*, 223 U. S. 573 at 591, in which case this court used the following language:

> "While it is true that upon a writ of error to a State Court we cannot review its decision upon pure questions of fact, but only upon questions of law appearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and fact a decision of the latter."

This court has also held that it will examine the evidence where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatsoever to support. See *Cedar Rapids Gas Light Company* v. *Cedar Rapids*, 223 U. S. 655; *Creswill* v. *Grand Lodge Knights of Pythias*, 225 U. S. 246 at 261;

Norris v. *Alabama,* 294 U. S. 587 at 590; *Truax* v. *Corrigan,* 257 U. S. 321, 324-325.

This Court has likewise stated the principle of law applicable to the facts in this case at bar in the case of *Davis* v. *Wechsler,* 263 U. S. 22 at 24, in which the following statement was made:

> "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon legal grounds."

In order to determine whether there has been a denial of a Federal right of the Petitioners to due process of law under the Fourteenth Amendment it would be necessary for this Court to examine all of the facts and circumstances and record, including pleadings in the case of *Burke* v. *Kleiman,* the decree of which was pleaded and sustained as *res judicata* against the Petitioners. Unless the Court did examine the facts of this case and the facts of *Burke* v. *Kleiman* a grave injustice would result to the Petitioners because the denial of their Federal Constitutional rights to due process of law under the Fourteenth Amendment has been cloaked under the pretext of *res judicata* a procedural device of local law in Illinois. The judgment and opinion of the Supreme Court of the State of Illinois sustained an alleged rule of State pleading or procedure, that is *res judicata,* arbitrarily and unreasonably to avoid a decision upon the question of a Federal right to due process of law under the Fourteenth Amendment. This court has held that rules of State pleadings or procedure may not be used arbitrarily and unreasonably as a mere cloak or pretext to avoid or evade a decision upon a Federal Constitutional right. See *Patterson* v. *State of Alabama,* 294 U. S. 600

at 602; *Davis* v. *Wechsler,* 263 U. S. 22 at 24. In the last named case this Court used the following applicable language:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

We wish to point out that the topical sentence in the respondents' Brief on page 15 to this effect "the finding of fact by the Illinois Supreme Court that the only fraud in this record is on petitioners is supported by competent evidence and conclusive here" is a wholly incorrect statement of what is in the Illinois Supreme Court opinion. The Supreme Court of Illinois, in referring to the case of *Burke* v. *Kleiman* (R. 467-468) and to some of Burke's alleged actions, made the following statement:

> "As far as the record shows, if any fraud was committed, it was by Burke after he left the association. (R. 468.)"

The petitioners do not admit, but in fact vigorously deny that Burke committed any fraud whatsoever, but on the contrary he ceased his efforts to enforce a restrictive agreement which he finally learned did not exist. Certainly a man commits no fraud when he learns the error of his ways in connection with a fraudulent nonexistent restrictive agreement and thereafter attempts to atone for his wrongdoing in having previously made efforts to enforce said nonexistent agreement. Burke attempted to correct the harm that he had done which is much more than can be said of the respondents in this case.

But even so, it is perfectly plain that the Supreme Court of Illinois made absolutely no statement whatever

that any fraud had been committed by the petitioners. The Supreme Court of Illinois made an unwarranted charge of fraud against James Joseph Burke. The record in this case and the record in the case of *Burke* v. *Kleiman* proves conclusively that the Woodlawn Property Owners Association caused to be filed a *false complaint* alleging the existence of a restrictive agreement which had been executed by the owners of ninety-five per cent of the frontage when in truth and in fact it was known to Fred L. Hellman, Executive Secretary of said Association, for a period of three and one-half years prior to the filing of the case of *Burke* v. *Kleiman* that there was NO restrictive agreement whatsoever and that it had never come into force and effect according to its own terms. (R. 203-206.)

The affidavit of Fred L. Hellman was never at any time contradicted nor was there offered in opposition to it any evidence or affidavit by anyone whatsoever, and being uncontradicted and unrebutted, it stands as a conclusive fact. Moreover, the Chancellor found in his decree that the alleged restrictive agreement was executed *by less than the owners of ninety-five per cent of the frontage* (R. 72 at 78), and besides the Chancellor in his oral decision made a definite finding of fact that the agreement was nonexistent and invalid according to its own terms. (R. 191 at 193.)

Under the law of the State of Illinois, all allegations of fact which are not fairly and certainly denied by some pleading or affidavit in opposition thereto, are deemed to be admitted under the provisions of the Civil Practice Act. The facts in the Answer of James Joseph Burke were never denied or rebutted.

II.

Granting for the sake of the argument that private land owners may contract for the control and disposition o their own property, yet it is true that the enforcement o such an agreement by the States' Courts and judicia officers is a violation of the Fourteenth Amendment.

The petitioners have nowhere in their Brief contende that private landowners do not have the right to contrac for the control and disposition of their own property b executing an agreement binding themselves not to se or lease their property to colored people. Such an agree ment might possibly be valid among the property owner themselves and might carry with them whatever re straints and sanctions that might exist among themselve by the execution of such an agreement, and would b valuable to them in aid of any public opinion sought t be maintained among neighboring landowners. But is the contention of these Petitioners that the *enforcemer* of such a harsh, oppressive, and discriminatory restri tive agreement against Negroes solely on account o their race or color deprives Negroes of their equal Con stitutional rights to own and acquire property *when white persons are willing freely to convey such propert to them.* The petitioners do not contend that such a re strictive agreement among private landowners is invali but they contend that the *enforcement by the States Courts and Judicial Officers* in fact makes an agreemer *judicially* when the legislature of the State is powerles to make one *legislatively.* See *Buchanan* v. *Warley,* 24 U. S. 60; *Chicago, Burlington & Quincy Railway Com pany* v. *Chicago,* 166 U. S. 228.

What is involved in the case at bar is the right of

Negro to own property freely conveyed by a white person willing so to convey. There is no contention whatsoever that the Fourteenth Amendment gives Negroes *the right to compel white persons to convey property to them.* We do contend, however, that J. B. Crook, a white person, being willing to convey to Hansberry, a Negro, had a perfect right to do so and that after the conveyance was made that the enforcement of an alleged restrictive agreement against the Hansberrys solely on account of their race or color was a denial of due process of law and the equal protection of the laws under the Fourteenth Amendment to the Federal Constitution. The petitioners likewise contend that Katz, if he chose to do so, had a right to sell his property to Negroes.

III.

The Illinois law upon the doctrine of res judicata is inapplicable where there is a denial of the Federal right to due process of law in violation of the Fourteenth Amendment.

The Respondents have cited a long list of Illinois Supreme and Appellate Court cases all of which are inapplicable to the facts of the case at bar and are improperly applied to the facts of this case. The respondents have wholly misapprehended the contentions of the Petitioners in this court. We do not complain of any mere error of the Supreme Court of Illinois in applying the local law of the State of Illinois in respect to the doctrine of *res judicata.* We contend that the application of the doctrine of *res judicata* by the State Courts was a denial of due process of law and the equal protection of the laws because the sustaining of the plea of *res judicata* wrongfully denied the petitioners the *benefit* of notice

and a real opportunity to appear, to defend, and to be heard, and that the Federal Constitutional rights of the petitioners were thereby violated. See *Postal Cable Telegraph Co.* v. *New Port,* 247 U. S. 464; *Windsor* v. *McVeigh,* 93 U. S. 274; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673; *Wabash Railway Co.* v. *Adelbert College,* 208 U. S. 38.

Although it is true that this Court ordinarily recognizes that *res judicata* is a question of local law, nevertheless this Court has always examined the particular facts and circumstances of each case in which the plea of *res judicata* has been sustained, for the purpose of determining whether the litigant has been denied the benefit of notice, and a real opportunity to appear, to defend and to be heard. See *Ward* v. *The Board of County Commissioners of Love County, Okla.,* 253 U. S. 17, 22, 23; *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Postal Cable Telegraph Co.* v. *New Port,* 247 U. S. 464 at 475-476; *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U. S. 673.

In the case of *Kersh Lake Drainage County Commissioners* v. *Thompson,* 309 U. S. 485, cited by respondents in their brief, this Court refused to apply the doctrine of *res judicata* against landowners each of whom had various *personal* defenses to the levy and extension of certain drainage taxes, and held that each landowner had a right to defend as to the particular amount of taxes owed by him, and further *that each landowner had personal defenses peculiar to such landowners and that such personal and peculiar defenses could not be foreclosed or precluded by the application of the doctrine of res judicata,* which if applied would deny to such landowners the right and benefit of notice and a real opportunity to appear, to defend, and to be heard.

In the case at bar each of the alleged parties signatory

to the alleged but nonexistent agreement, had a right to set up the personal defenses of lack of due execution of the agreement, alteration of the instrument, forgery, change in the character of the neighborhood, and the signing of said instrument upon the express condition that the signature of such signer would be a nullity if the owners of ninety-five per cent of the frontage of said area did not in fact execute and deliver said instrument.

The wrongful application of the doctrine of *res judicata* denied the petitioners their Federal constitutional rights because the petitioners were thereby foreclosed, barred, and prevented from setting up and successfully maintaining (as shown by the record of this case and the case of *Burke* v. *Kleiman*) all of the above mentioned defenses which were *personal and peculiar* to each of them.

The fact that the Supreme Court of Illinois ignored the Federal Constitutional question raised by petitioners does not foreclose such contentions in this Court. In the case of *Ward* v. *The Board of County Commissioners of Love County, Okla.*, 253 U. S. 17, 22, this Court made the following statement:

> "It therefore is within our province to inquire not only whether the (Federal) right was denied in express terms, but also, whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. Of course, if non-federal grounds *plainly untenable*, may be thus put forward successfully, our power to review may easily be avoided."

The sustaining of the plea of *res judicata* against petitioners by the Supreme Court of Illinois was a mere cloak and pretext put forward to avoid a decision upon the question of the denial to Petitioners of the Federal

Constitutional right to due process of law under the Fourteenth Amendment. See *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Ward* v. *The Board of County Commissioners of Love County, Okla.,* 253 U. S. 17-22; *Patterson* v. *The State of Alabama,* 294 U. S. 600, 602.

IV.

The State Court decree does offend the Fourteenth Amendment.

For the reasons set out in Petitioners' brief, the decree of the Superior Court of Cook County affirmed by the Supreme Court of Illinois, did result in a deprivation of petitioners' rights and property in violation of the Fourteenth Amendment to the Federal Constitution. The Respondents attempt to limit the application of the Fourteenth Amendment unduly by a purposeful disregard of the provision in the Amendment extending the equal protection of the laws to all citizens. The instant cause is not one where the situation referred to by Respondents exists. Under Point 4 in their Brief Respondents fallaciously apply the reasoning of "*Corrigan* v. *Buckley,*" 299 Fed. 899, by stating that *the constitutional privilege of a Negro to own property* does not carry with it the constitutional right to compel the sale and conveyance of any particular property. The respondents, in the use of the language of that case, support the contention of the Petitioners, that there is a constitutional privilege in the Negro as a citizen of the United States to own property and that in fact property ownership is one of the essential attributes of citizenship. Surely the constitutional privilege carries with it the right to freedom from arbitrary and wilful seizure of property by duly constituted state agencies.

The Respondents further, in Point IV, in their brief have apparently undertaken the responsibility of rewriting some of the basic holdings of constitutional law. They refer to the property of the Petitioners Hansberry and state blandly that this is the only property involved and that therefore, the Petitioners Hansberry are the only ones that have a basis for asserting the protection of the Fourteenth Amendment. The respondents thus blow hot and cold. They would on the one hand disregard the rights of the Negro as a citizen, which were asserted by the Fourteenth Amendment, and on the other disregard the extension of the Fourteenth Amendment to the protection of other than real property rights, asserted in a long line of decisions in this Court.

There is property referred to in the record for the application of the due process clause of the Fourteenth Amendment. The Petitioner Katz was denied the effective use of his property by the state court decree. The petitioner, Supreme Liberty Life Insurance Company, was denied its right to do business and a valid mortgage lien was impaired in a manner inconsistent with the instrument sued on. The Petitioners Hansberry were, of course, despoiled of their property, which was arbitrarily taken from them by the agents and officers of the state court. Respondents err seriously when they confine property rights to those in real property as they apparently do in their brief.

Respondents cite the case of *"Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Company,"* 243 U. S. 157 at 166, in support of the general proposition that the due process clause cannot in and of itself take up the laws of the several states and make a question pertaining to them a constitutional question. This the Petitioners have not sought to do. In the case cited, which was

an action to determine the relative rights of parties to divert water, this court held that no jurisdiction existed to review a matter when a state court judgment is based on two grounds, one of which involves a Federal question and the other not. The court, however, expressly stated that where the non-Federal ground is so interwoven with the Federal question, court will take jurisdiction of the matter. In the case cited, the chief contention was quite apparently the misapplication of the state law. In the instant case the respondents clearly set out in their brief the Federal ground based on a deprivation of due process caused by the wrongful application of the doctrine of *res judicata* and the arbitrary and unlawful seizure of property by state agents.

Respondents make a serious misstatement when they state in their brief that the petitioners are at liberty to acquire and exercise all of the rights and ownership of real estate in Chicago, except the small area, which was the subject matter of the action below. A reference to Petitioners' brief will again impress the court with the serious social situation resulting where so many Negro citizens have been compressed into a small area, with a portion of that area suffering from a purported restrictive agreement.

In passing, it should be noted that the principle in the case of *Colgate* v. *Harvey,* 296 U. S. 404, 472, was not overruled by the case of *Madden* v. *Kentucky,* 309 U. S. 83 at 93. The *Madden* v. *Kentucky* decision stated that the right to deposit money in banks is not a privilege of National citizenship. The decision did not reject the idea of a National citizenship for which purpose the *Colgate* v. *Harvey* case was cited in Petitioners' brief.

V.

Specific performance in the instant case did offend the Fourteenth Amendment.

The decree of the state court required the Petitioners Hansberry to convey their property without compensation. To state otherwise is to disregard the statement in the decree entered by the trial chancellor. The decree, in ordering the conveyance by the Master in Chancery in the Superior Court, did not perform the function of a writ of assistance as claimed by the respondents. Here, in an action where the basic agreement expressly provided against forfeiture, persons were stripped and divested of legal title as distinguished from possession after a finding by a court of competent jurisdiction upon a full hearing of the merits, which would be required for the issuance of a writ of assistance.

The doctrine in *Svelina* v. *Sarvans,* 341 Ill. 236, cited by Respondents, is clearly inapplicable in the instant cause. In that action a conveyance was made for the purpose of defrauding and cheating creditors. Under such circumstances any court would be justified in refusing the return of the consideration. In the instant cause the Petitioners Hansberry, consistent with their rights as citizens of the United States, paid a valuable consideration for title with no thought of defrauding or cheating anyone. There were no restrictions contained in the deed. Surely there is no justification for bringing this set of circumstances under the doctrine of the case cited.

The respondents should not further confuse the issue by referring to cases where the restriction appears in the deed of conveyance. It should again be noted that the restrictive agreement itself expressly provided against forfeiture.

VI.

The record does not support the injunction against the Petitioner Katz.

Petitioners refer again to their brief in answer to the statement made in Point VI of Respondents' brief. The decree *could not oblige Katz to abide by his own agreement* when all of the facts in the record show that he never intended to enter into the agreement and certainly never made any specific threats such as would justify the injunction.

VII.

The insurance company is exempt as a mortgagee.

Since the purported restrictive agreement clearly exempts mortgagees from the operation of the agreement, it is difficult to see how the decree can be justified as against the Insurance Company and how further the doctrine of *res judicata* could apply to it since it was not in any sense a party or privy to the case of *Burke* v. *Kleiman*. The Petitioners state a bald unsupported conclusion when they state that the agreement protects the mortgage by restoring the property to merchantable status when in fact it does the opposite.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 803 29

CARL A. HANSBERRY, NANNIE L. HANSBERRY, SUPREME LIBERTY LIFE INSURANCE COMPANY, JAMES JOSEPH BURKE AND ISRAEL KATZ,
Petitioners,

vs.

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, LOUISE G. ANDERSON, LYMAN M. ANDERSON AND KATHRYN LUTTRELL,
Respondents.

BRIEF OF ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, LOUISE G. ANDERSON, LYMAN M. ANDERSON AND KATHRYN LUTTRELL, RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY PETITIONERS.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 803

CARL A. HANSBERRY, NANNIE L. HANSBERRY, SUPREME LIBERTY LIFE INSURANCE COMPANY, JAMES JOSEPH BURKE AND ISRAEL KATZ,
Petitioners,

vs.

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, LOUISE G. ANDERSON, LYMAN M. ANDERSON AND KATHRYN LUTTRELL,
Respondents.

BRIEF OF ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, LOUISE G. ANDERSON, LYMAN M. ANDERSON AND KATHRYN LUTTRELL, RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY PETITIONERS.

STATEMENT OF FACTS.

(Corrective)

The instant petition for writ of certiorari is to review the decision of the Supreme Court of the State of Illinois which affirms the decree (Rec. 102) of the Circuit Court of Cook County, Illinois, entered in a representative or

class suit. This latter was brought by plaintiffs (respondents here) on behalf of themselves and all others similarly situated against the defendants (petitioners here). It involved a conspiracy by defendants to violate a restrictive agreement which in numerous representative or class suits in both trial and reviewing courts had been adjudicated valid and in full force and effect.

Burke v. *Kleiman,* Superior Court Case Gen. No. 567687 (Rec. 338-53); affirmed in *Burke* v. *Kleiman,* 277 Ill. App. 519; 189 N. E. 372.

Cook, et al. v. *Yondorf, et al.,* Superior Court of Cook County Illinois, Case Gen. No. 34S1261 (Rec. 416-23).

Penoyer, et al. v. *Cohn, et al.,* Superior Court of Cook County, Illinois, Case Gen. No. 34 S 16816 (Rec. 425-42).

The restrictive agreement was a covenant running with the land, duly recorded (Rec. 67), and prohibited, as specified in the agreement, ownership or occupancy by negroes of those lands in the Washington Park Subdivision, the owners of which had signed the agreement, their heirs, executors, assignees, privies, etc. The agreement itself is set forth *in haec verba* in *Burke* v. *Kleiman,* 277 Ill. App. 519.

The stipulation entered into between the parties in the trial court in the *Burke* v. *Kleiman* case proves that each and every issue raised or possible to be raised was before the Court for adjudication. The stipulation is set forth in the decree entered in that case (Rec. 65) excepting as to its last paragraph, which reads as follows (Rec. 394):

"Nothing in this stipulation contained shall be deemed to be an admission by either plaintiff or defendant as to the materiality, relevancy or compe-

tency of any of the facts herein stipulated, and the aforesaid stipulation of facts shall not prevent either party from offering further and other evidence on the issues which may be material, relevant or competent."

The Washington Park Subdivision comprises territory bout one-half mile square, is bounded on the north by e great Washington Park of Chicago, to the east by The niversity of Chicago and its affiliated activities and prop-rty ownerships, together with other white ownerships nd occupancies, to the west is now negro occupancy, to e south is now mixed occupancy.

In the *nisi prius* state court in the case upon which the tition herein is founded, the plaintiff moved for a tem-orary injunction, the defendants moved to dismiss the mplaint, Judge Michael Feinberg ordered that the in-nction as prayed issue, defendants perfected an inter-cutory appeal, the Appellate Court affirmed the injunc-on order (*Lee* v. *Hansberry*, 291 Ill. App. 517). Upon turn to the Circuit Court answers were duly filed by e defendants, who also filed motions to dissolve the tem-orary injunction. The plaintiffs filed motions to strike arts of the answers. The answers, among other things, enied for the first time the execution, notarization, re-rdation, validity—the existence—of the restrictive greement. Amended answers to the same effect were ed by the defendants. Plaintiffs duly filed objections , and motions to strike, parts of these. In apt rule time aintiffs also filed their reply to all of these answers and nended answers. In this reply plaintiffs pleaded, in de-iled particularity, *res judicata* (Rec. 58-69):

(A) As by estoppel by judgment in bar as to those of the defendants who had signed the restrictive agree-

ment or who were assignees, successors or privies to those who had signed it; and

(B) As by estoppel by verdict as to all of the defendants to dispute or contest the execution, the delivery, the existence, compliance with the conditions precedent, and the enforceability of the restrictive agreement sued upon.

With the record in such shape, argument started on the various motions and settlement of pleadings and proceeded until the court elected to reserve his rulings on all of these questions, to at once go to a final hearing on the merits, and to settle all questions in and by his final decree. His order directing this procedure appears in the record (p. 76), as follows:

> "This matter coming on to be heard on the plea of counsel for plaintiffs that the case of *Burke* v. *Kleiman* be held *res judicata* as to the issues involved herein on certain objections filed to the answers and motions of the several defendants to dissolve the temporary injunctions heretofore issued herein, the court having examined the pleadings herein and heard the arguments of counsel for the respective parties and being fully advised in the premises,
>
> It Is Hereby Ordered that the matter proceed to a hearing and trial on the merits, and the rulings of the court upon the above plea, objections and motions be reserved until after the cause has been heard on its merits".

The hearing on the merits was had; the final decree was entered (Rec. 102). It adjudges the restrictive agreement valid, in full force and effect, a covenant running with the land, and not in contravention of the Costitu-

tions of the United States or State of Illinois, nor of the public policy of either, nor did it violate the rule against unlawful restraint of alienation or the rule against perpetuities. It sustained, on the proofs introduced, the plea of *res judicata* contained in plaintiffs' reply. It enforced specific performance of the restrictive agreement, as prayed in the complaint. It made permanent the temporary injunction.

The facts as to the petitioner-defendant Katz are: He was a signatory to the restrictive agreement; yet that he swore he would sell to negroes (Rec. 169) and his attitude and fixed purpose to violate the restrictive agreement are affirmed by his declarations against interest to that effect contained in his personally verified answer and rejoinder (Rec. 78, 91-100).

The bald fact as to the petitioner-defendant Burke is, that while he swore in his amended answer and rejoinder to a series of self-serving allegations which, if proved (despite their illustration of his true character), would be injurious to the plaintiffs' cause; yet he never appeared at the trial to testify in substantiation of any one of them. The logical deduction is obvious.

The facts of record in this cause concerning the case of *Burke* v. *Kleiman* consist alone of the pleadings, stipulation, decree therein and affirmance thereof by the Appellate Court, plus the oral testimony of Isaac Kleiman and James L. Hall, two of the defendants in that suit (Rec. 64, 65, 237, 374). No fraud or collusion is deducible from their testimony. None existed, as the Supreme Court of Illinois found as a matter of fact in its opinion.

The facts concerning the comments of the trial judge contained in his so-called opinion delivered prior to his

entry of the final decree in the Circuit Court, and which are so distortedly used by petitioners in their attempt to impute fraud and collusion as existing in the *Burke* v. *Kleiman* litigation, are as follows:

The pleadings, motions, counter-motions, supporting and opposing affidavits had become so many and the arguments upon them had become so complicated and involved, that in the middle of this argument the Court called a halt and adopted the extra-ordinary procedure (*ante,* 76) of forcing the litigants to a trial on the merits without any pleadings having been settled. Confusion on that trial immediately resulted, but prior to the introduction of any evidence by the defendants, and with the consent of all parties in court, the plaintiffs, by their counsel, made the following general and specific objection (Rec. 400):

> "In order to expedite matters as far as possible so there won't be a constant running of objections here any more than is necessary, I want to make a general objection such as the other side did in reference to our testimony—that is, if it is agreeable to the Court and counsel to have a general objection and have it carried through without my having to repeat it each time—in this behalf.
>
> "That as to the defendants Israel Katz, Carl A. Hansberry and Nannie L. Hansberry, J. B. Crook, Hallie C. Crook, James Joseph Burke and Harry H. Pace, each of whom is shown by the record to have either signed the Restrictive Agreement introduced in evidence as Plaintiffs' Exhibits 5, 5-A, B & C, or are persons in privity of estate as grantees either direct or remote, of persons who had signed the Agreement, we object to them, or any witnesses for them, or any documentary evidence which seeks to attack the validity of that Agreement as being estopped by reason of being grantees and in privity of estate.

"Then as to all of the defendants we object to any testimony by them or on their behalf which in any way seeks to attack or deny the execution, the delivery, the existence, the compliance with the conditions precedent, the enforceability of the Restrictive Agreement admitted in evidence as Plaintiffs' Exhibits 5 and 5-A, B, C, because of the estoppel by verdict against each and all of the defendants, from attacking the validity, the delivery, the execution, the existence and enforceability of that agreement, by reason of *res judicata* from the judgment and the decree of the Superior Court of Cook County, Illinois, entered in the case of *Burke* v. *Kleiman, et al.*, Gen. No. 567687, entered on October 2, 1933, being a class suit, which decree also was affirmed by the Appellate Court on November 27, 1934, Appellate Court for the First District case No. 37522 entitled there *Burke* v. *Kleiman, et al.*"

The Court: "I think that is very satisfactory."

Then followed all the testimony of the defendants, subject to that objection. Subsequently the plea of *res judicata,* and the above objection were sustained. Yet the illogical and unfounded comments of the trial judge remained in the so-called opinion. Plaintiffs in their brief filed cross-errors in reference thereto, and particularly to the comments concerning the activities of the defendant Burke in connection with the institution and prosecution of the suit of *Burke* v. *Kleiman* concerning which there was not a scintilla of evidence in the record. Plaintiffs asked the Supreme Court of Illinois to make in its opinion appropriate comment upon and disposition of the unfounded statements complained of in this cross-error, which that court did fully in its decision (Appendix—Petition 47, 51).

SUMMARY.

I.

A. The opinion of the Supreme Court of Illinois here sought to be reviewed is founded upon the doctrine of res judicata based upon prior decisions in that State. Whether the judgment of a state court is res judicata is purely a question of state law.

Oklahoma Pkg. Co. v. *Oklahoma Gas & El. Co.*, 84 L. Ed. 194-199.

Oklahoma Pkg. Co. v. *Oklahoma Gas & El. Co.*, 84 L. Ed. 329-332.

Union Planters Bank v. *Memphis*, 189 U. S. 71, 75.

Covington v. *First National Bank*, 193 U. S. 100, 109.

Wright v. *Georgia R. & Banking Co.*, 216 U. S. 420, 429.

B. Questions of state law do not engage the due process clause of the 14th Amendment.

Enterprise Irrigation District v. *Canal Co.*, 243 U. S. 157 (165).

Sayward v. *Denny*, 158 U. S. 180, 186.

Central Land Co. v. *Laidley*, 159 U. S. 103, 112.

C. State court's decisions thereon are controlling.

Preston v. *Chicago,* 226 U. S. 447, 450.

St. Louis & Kansas City Land Co. v. *Kansas City,* 241 U. S. 419 (427).

Old Colony Trust Company v. *City of Omaha,* 230 U. S. 100, 116.

II.

Neither by the majority opinion nor by the dissenting opinion of the highest court of the State does it appear that a Federal question was raised or actually decided, or that the decision of any Federal question was essential to the judgment rendered.

Opinion, Rec. 464-473.

III.

Although the Supreme Court of the United States may consider the entire record in passing upon the question of jurisdiction to review the case, findings of fact are not reviewable. The state court opinion finds as facts, and holds, that there was no evidence of fraud or collusion in the Burke v. Kleiman case and no showing of fraud or collusion in procuring the stipulation of facts, or that there was not an actual controversy in that case.

This Court has repeatedly held that it accepts the findings of the state court upon matters of fact as conclusive and binding upon it.

Waters-Pierce Oil Co. v. *Texas,* 212 U. S. 86, 97.

Miedreich v. *Lauenstein,* 232 U. S. 236, 243.

Kerfoot v. *Farmers & Merchants Bank,* 218 U. S. 281, 288.

IV.

To confer jurisdiction on this Court it must appear affirmatively from the record not only that a Federal question was presented for decision to the highest court of the State but that its decision of the Federal question was necessary to the determination of the cause; that the Federal question was actually decided or that judgment, as rendered, could not have been given without deciding it.

Southwestern Bell Tel. Co. v. *State of Oklahoma,* 303 U. S. 206, 212.

Eustis v. *Bolles,* 150 U. S. 361, 368.

Pierce v. *Somerset Railway,* 171 U. S. 641, 648, 649.

Rutland R. R. v. *Central Vermont R. R.,* 159 U. S 630.

Seneca Nation v. *Christy,* 162 U. S. 283, 289.

Heim v. *McCall,* 239 U. S. 175.

Harding v. *Illinois,* 196 U. S. 78, 85.

Clark v. *McDade,* 165 U. S. 168, 172.

Fowler v. *Lamson,* 164 U. S. 252.

Mo. Pac. v. *Fitzgerald,* 160 U. S. 556, 576.

Cal. Powder Wks. v. *Davis,* 151 U. S. 389-393.

V.

Where the judgment of a state court rests upon two grounds, one of which is Federal and the other non-Federal in character, the jurisdiction of this Court fails if the non-Federal ground is independent of the Federal ground and adequate to support the judgment.

Fox Film Corporation v. *Muller*, 296 U. S. 207, 210.

Wood v. *Chesborough*, 228 U. S. 672, 679.

Consolidated Turnpike Co. v. *Norfolk & O. V. R. Co.*, 228 U. S. 596, 599.

Interurban Ry. Co. v. *Olathe*, 222 U. S. 187, 190.

Gaar S. & Co. v. *Shannon*, 223 U. S. 468.

Berea College v. *Kentucky*, 211 U. S. 45, 53.

Eustis v. *Bolles*, 150 U. S. 361, 366.

Enterprise Irrig. Dist. v. *Canal Co.*, 243 U. S. 157, 163, 164.

Lynch v. *N. Y. ex rel. Pierson*, 293 U. S. 52, 54.

Lowry v. *Silver City Gold & Silver Mining Co.*, 179 U. S. 196, 198.

Browne v. *Union Pacific Ry. Co.*, 267 U. S. 255, 259.

VI.

A. The judgment of the Supreme Court of Illinois rested upon general law, to-wit: The doctrine of res judicata and estoppel by verdict, and it held that the decrees entered in the Burke v. Kleiman case (and other cases in the Superior and Circuit Courts) settled the question of the due execution and validity of the Restrictive Agreement, and that these cases, being representative or class actions, the defendants were bound by these decrees. Such judgments, based upon questions of general law, are not subject to review on the grounds here advanced.

Chouteau v. *Gibson,* 111 U. S. 200, 201.

San Francisco v. *Itsell,* 133 U. S. 65.

California v. *Holladay,* 159 U. S. 415.

Opinion in instant case, Rec. 464.

Decree in *Burke* v. *Kleiman,* Rec. 338.

Decree in *Cook* v. *Yondorf,* Rec. 416.

Decree in *Penoyer* v. *Cohn,* Rec. 425.

Burke v. *Kleiman,* 277 Ill. App. 519.

Lee v. *Hansberry,* 291 Ill. App. 517.

B. The opinion of the Supreme Court of Illinois as to res judicata, estoppel by verdict and representative or class actions followed a long line of established decisions of that Court.

Groves v. *Farmers State Bank,* 368 Ill. 35, 40, 45, 47.

Leonard v. *Bye,* 361 Ill. 185, 190, 192.

People ex rel. v. *Circuit Court of Washington County,* 347 Ill. 34.

Greenberg v. *Chicago,* 256 Ill. 213, 215, 219.

Harmon v. *Auditor Public Accounts,* 123 Ill. 122.

VII.

This Court will decline jurisdiction of certiorari where the State court followed previous decisions of the Supreme Court of the United States, or if the Federal question, if any, has been settled by previous decisions of the Federal courts.

Minn. St. P. & St. L. M. R. Co. v. *Merrick,* 254 U. S. 376, 378.

Mo. Pac. R. R. v. *McGrew Coal Co.,* 256 U. S. 134, 135.

Miller & Lux & Sacramento v. *Drain. Dist.,* 256 U. S. 129, 130.

Zucht v. *King,* 260 U. S. 174, 176.

Quinn v. *U. S.,* 260 U. S. 438, 440.

VIII.

The only Federal question raised by the pleadings in the State court was the constitutionality of a Restrictive Agreement entered into by over five hundred property owners in Chicago, restricting their real estate against use, occupancy or ownership by negroes. Such restrictive agreements have been repeatedly sustained against attack that they are unconstitutional or against public policy, not only in state courts, but in this Court and in other Federal courts.

Corrigan v. *Buckley,* 271 U. S. 323, 329-330.

Corrigan v. *Buckley,* 299 Fed. 899, 901.

Torrey v. *Wolfes,* 6 Fed. (2d) 702, 703.

Russell v. *Wallace,* 30 Fed. (2d) 981.

Cornish v. *O'Donoghue,* 30 Fed. (2d) 983, 984.

Grady v. *Garland,* 89 Fed. (2d) 817.

Ridgway v. *Cockburn,* 296 N. Y. S. 936.

Parmalee v. *Morris,* 218 Mich. 625.

Burke v. *Kleiman,* 277 Ill. App. 519.

ARGUMENT.

The question of the validity of the Restrictive Agreement here involved first came before the courts for adjudication in 1932, in the case of *Burke* v. *Kleiman* in the Superior Court of Cook County, Illinois, Gen. No. 567687. That was a representative or class suit. The parties thereto entered into a stipulation of facts, the last paragraph of which reads (Rec. 394):

> "Nothing in this stipulation contained shall be admitted to be an admission by either plaintiff or defendant as to the materiality, relevancy or competency of any of the facts herein stipulated, and the aforesaid stipulation of facts shall not prevent either party from offering further and other evidence on the issues which may be material, relevant or competent."

So that nothing was withheld by the parties to restrict or limit the court's jurisdiction in the determination of the question of the validity of the Restrictive Agreement. The Superior Court decreed that agreement valid (Rec. 338). That decree was affirmed in *Burke* v. *Kleiman,* 277 Ill. App. 519, wherein the Court says (at p. 533):

> "Appellants have not contended that the restrictions violate any of the amendments to the United States constitution, nor that they are against public policy, but complainant has seen fit to argue, at some length, that the restrictions do not violate the fifth, thirteenth or fourteenth amendments to the United States constitution and that they are not against public policy. While it is entirely unnecessary, because of appellants'

attitude, for us to consider this argument, we may state that the following authorities cited in support of it sustain the position of complainant: *Corrigan* v. *Buckley,* 299 Fed. 899; *Corrigan* v. *Buckley,* 271 U. S. 323; *Parmalee* v. *Morris,* 218 Mich. 625; *Queensborough Land Co.* v. *Cazeaux,* 136 La. 724; *Los Angeles Investment Co.* v. *Gary,* 181 Cal. 680; *Koehler* v. *Rowland,* 275 Mo. 573. Complainant also cites *People* v. *Forest Park Cemetery Co.,* 258 Ill. 36, wherein the court held that the refusal of a cemetery corporation to sell a lot to a colored person and admit the body of his wife for burial, solely upon the ground of his color, is not a violation of the rights of such person under the constitution of this State, nor under the fourteenth amendment to the Federal constitution, which applies only to acts of the State."

The validity of the Restrictive Agreement again was decreed in two other representative or class suits (*ante* , 12).

Thereafter petitioners herein entered into a conspiracy threatening to violate, and did violate, the Restrictive Agreement. All of them, excepting the Supreme Liberty Life Insurance Company, are members of the same class as the plaintiffs in the foregoing action. They, or their remote grantors, signed the Restrictive Agreement and are bound thereby. The conspiring insurance company was prevented from disputing the validity of the Restrictive Agreement under the doctrine of estoppel by verdict pleaded and sustained.

Plaintiffs in the instant case in the State court (they are members of the same class), on behalf of themselves and all others similarly situated, filed their complaint to restrain the defendants from violating the Restrictive

Agreement and for other relief. Defendants attacked the validity of the Restrictive Agreement on various grounds and plaintiffs pleaded *res judicata,* based upon the aforesaid prior state decisions. As appears from the opinion in *Burke* v. *Kleiman, supra,* no Federal question was involved in them, and, accordingly, the decisions of the trial and the Supreme Court of Illinois that those cases constituted *res judicata* as to the validity of the Restrictive Agreement, are based upon purely general and state law and involve no federal question. Also, the decision itself of the Supreme Court of Illinois, that the question of the validity of the Restrictive Agreement is *res judicata,* is purely a question of state law. No federal question is involved.

Oklahoma Packing Co. v. *Oklahoma Gas & El. Co.,*
84 L. Ed. 194, 199.
Oklahoma Packing Co. v. *Oklahoma Gas & El. Co.,*
84 L. Ed. 329, 332.

We desire to say a further word in reference to the continued effort of the petitioners to cast doubt upon the decree in *Burke* v. *Kleiman* alleging it was secured by fraud and collusion. We repeat that there is not a word of evidence of fraud or collusion in the record. In addition to the fact that the defendant Burke did not testify, a reading of his answer, in which his self-serving statements appear, shows that even he did not claim any fraud or collusion in the bringing of the *Burke* v. *Kleiman* case. He says in his answer (Rec. 44) that about four months prior to the "alleged transaction" be *believed* the purported agreement not to be in existence or valid. The "alleged transaction" referred to the time (May, 1937) when Burke introduced the defendant J. B. Crook to an officer of the First National Bank of Englewood as a bona fide buyer of the 6140 Rhodes Avenue property, which de-

fendant Hansberry afterwards acquired and which is the property involved in the instant case. The decree in the *Burke* v. *Kleiman* case was entered on Oct. 2, 1933 (Rec. 64), or about there and one-half years before the transaction in regard to the Hansberry property. Burke was the husband of Olive Ida Burke, the defendant in the *Burke* v. *Kleiman* case (Rec. 44), and he says in his answer (Rec. 44) that he purchased his property through his wife in the belief that the purported agreement was valid, and "that in said suit he acted in good faith" (Rec. 45).

Restrictive agreements identical in substance with the one in the instant case are held as constitutional and not against public policy in the federal courts. We quote briefly from two cases:

Corrigan v. *Buckley*, 299 Fed. 899, 901.

> "We are not dealing with the validity of a statute, or municipal law, or ordinance; nor are we concerned with the right of a Negro to acquire, own, and use property; nor are we confronted with any pre-existing rights which are affected by the covenant here in question. *The sole issue is the power of a number of landowners to execute and record a covenant running with the land,* by which they bind *themselves,* their heirs and *assigns,* during a period of 21 years, to prevent any of the land described in the covenant from being sold to, leased to, or occupied by Negroes. • • •
>
> "The constitutional right of a Negro to acquire, own and occupy property does not carry with it the constitutional power to compel sale and conveyance to him of any particular private property. *The individual citizen, whether he be black or white, may refuse to sell or lease his property to any particular indi-*

vidual or class of individuals * * * What is denied one class may be denied the other. There is therefore, no discrimination within the civil rights clauses of the constitution. *Such a covenant is enforceable, not only against a member of the excluded class, but between the parties to the agreement.* Our attention has not been called to any decision of the Supreme Court of the United States involving the exact question before us. *It has however been before the Courts of the States, where it has been held that similar covenants against ownership or occupancy by Negroes are neither unconstitutional nor contrary to public policy.* (Citing *Parmalee* v. *Morris,* 218 Mich. 625; *Queensboro Land Co.* v. *Cazeaux,* 136 La. 724; *Los Angeles Investment Co.* v. *Gary,* 181 Cal. 680, and *Koehler* v. *Rowland,* 275 Mo. 573.)'' (Italics ours.)

The case was appealed to the Supreme Court of the United States wherein the appeal was dismissed in

Corrigan v. *Buckley,* 271 U. S. 323

which at p. 329 holds:

''Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss, that the indenture or covenant which is the basis of the Bill is 'void' in that it is contrary to and forbidden by the Fifth, Thirteenth and Fourteenth Amendments. *This contention is entirely lacking in substance or color of merit.* The Fifth Amendment is a limitation only upon the powers of the general government, *Talton* v. *Mayes,* 163 U. S. 376, 382, and is not directed against the action of individuals. The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced, compulsory service of one to

another, *does not in other matters* protect the individual rights of persons of the Negro race. * * * And the prohibitions of the Fourteenth Amendment have reference to state action exclusively and not to any action of private individuals. (Citing cases.) It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment. Civil Rights cases 109 U. S. 3, 11. *It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void.* * * * We, therefore, conclude that neither the *constitutional* nor *statutory* questions relied on as grounds for the appeal to this Court have any substantial quality or color of merit, nor afford any jurisdictional basis for the appeal." (Italics ours.)

In the *Corrigan* case, as in the instant case, the point was raised that the agreement violated Sections 1977 and 1978 of the United States Revised Statutes. This Court disposed of that contention in the following language (p. 331):

"Assuming that this contention drew in question the 'construction' of these statutes, as distinguished from their 'application' it is obvious upon their face that while they provide *inter alia*, that all persons and citizens shall have equal right with white citizens to make contracts and acquire property, they, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property."

Following the *Corrigan* cases, the Federal courts have sustained the validity of such restrictions in:

Torrey v. *Wolfes,* 6 Fed. (2d) 702.
Russell v. *Wallace,* 30 Fed. (2d) 981.
Cornish v. *O'Donoghue,* 30 Fed. (2d) 983.

It is respectfully submitted that the questions raised by the petitioners on which the decision of the cause depends, are so unsubstantial as to not need further argument. We therefore respectfully urge that the petition for certiorari be denied.

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Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 29.

CARL A. HANSBERRY, NANNIE L. HANSBERRY; SUPREME LIBERTY LIFE INSURANCE COMPANY, an Illinois Corporation, HARRY H. PACE, JAMES JOSEPH BURKE and ISRAEL KATZ,

Petitioners,

v.

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, LOUISE C. ANDERSON, LYMAN M. ANDERSON and KATHRYN LUTTRELL,

Respondents.

WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR RESPONDENTS

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WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR RESPONDENTS.

THE OPINIONS BELOW.

A temporary injunction in this case was issued by the Circuit Court of Cook County, Illinois, on July 8, 1937. It is not reported but appears at page 20 of the record

and was affirmed on interlocutory appeal in *Lee* v. *Hansberry,* 291 Ill. App. 517. The final decree of the Circuit Court was entered August 19, 1938. It is not reported but appears at page 72 of the record. The opinion of the Supreme Court of Illinois is reported at 372 Ill. 369, (R. 327-336) and the principal case relied upon as *res judicata* therein is *Burke* v. *Kleiman,* 277 Ill. App. 519. Rehearing was denied December 13, 1939 and certiorari granted by this court on April 22, 1940. (R. 340)

JURISDICTION.

Jurisdiction in this case is based upon Section 237 (b) of the Judicial Code, as amended, Title 28 U. S. C. Section 344 (b). The petitioners argue upon several grounds that the decision of the Supreme Court of Illinois denies them due process of law under the Fourteenth Amendment to the Federal Constitution.

Petitioners in their brief rely for reversal principally upon the ground of fraud. This fraud is said to have occurred in a prior suit involving the same subject matter, that is, this particular restrictive covenant running with the land which bound the signers and their successors not to sell or lease their property to negroes for a period of approximately 21 years.

The trial court and the Supreme Court of Illinois both held that the prior suit, *Burke* v. *Kleiman,* 277 Ill. App. 519, was *res judicata* upon the question of the validity of this restrictive covenant; that it was a class or representative action, binding all those who signed the covenant or as privies succeeded to the titles of the signers. The trial court found, on the evidence, that petitioners here had conspired together by devious means to introduce negroes into a section restricted to white occupancy and that their acts were characterized by misrepresentation, deceit and fraud, including the

use of a white man acting as a dummy purchaser for the negroes. The Supreme Court of Illinois in addition to sustaining the ultimate fact of the conspiracy rested its decision principally upon the doctrine of *res judicata.*

Since the application of the doctrine of *res judicata* is primarily a matter of the law of Illinois, the question here is limited to whether there is evidence to support the findings below that *Burke* v. *Kleiman, supra,* was a decision in a class or representative action, reached in good faith and not fraudulent or collusive. We think that the evidence in support of these findings is conclusive.

The other issues with respect to the application of the decree to the individual petitioners do not appear to raise substantial federal questions.

STATEMENT.

This action is one of several class suits instituted by property owners in the Washington Park Subdivision of Chicago to enforce a covenant running with the land, of more than ten years standing, against ownership or occupation of their real estate by negroes. The covenant restricts some 550 parcels improved with residences and apartment buildings in an area about one-half mile square (R. 276A). It is bounded on the north by the great Washington Park and on the east by the Midway and the University of Chicago with its affiliated activities and other white occupancies. To the West is now negro occupancy and to the south, mixed. In no sense can it be called a white pocket in the black belt as petitioners contend. On the contrary aggressive enforcement of the covenant has made the subdivision a fortified frontier protecting social and real estate values for many years.

The covenant appears *in haec verba* in *Burke* v. *Kleiman,* 277 Ill. App. 519 and at pages 315-324 of the record. In substance it provides that for the best interests of the parties and the property described, none should be sold, leased or permitted to be occupied by negroes for a period of approximately 21 years, providing the owners of 95 per cent of the frontage signed and recorded the agreement by December 31, 1928. It further provides that the restrictions are to be considered appurtenant to and running with the land and binding upon and for the benefit of each party and enforceable by any party by any permissible legal or equitable proceeding including injunction and specific performance. The restrictions are made binding upon and for the benefit of and enforceable by and against each party, his successors and assigns, and the heirs, executors, administrators and successors of them respectively.

It was executed on September 30, 1927, signed by the owners of 95 per cent of the frontage, according to the computation of the Woodlawn Property Owners Association and recorded on February 1, 1928. Its execution and validity have been adjudicated and sustained by the Superior Court of Cook County, Illinois, in *Cook* v. *Yondorf,* General No. 34 S 1261 (R. 294); *Penoyer* v. *Cohn,* General No. 34 S 16816 (R. 301); and the Illinois Appellate Court in *Burke* v. *Kleiman,* 277 Ill. App. 519, and *Lee* v. *Hansberry,* 291 Ill. App. 517. All of these cases remain in full force and effect.

This complaint was filed in the Circuit Court of Cook County in June, 1937. It alleged the execution, recording and validity of the covenant as running with the land. It alleged that the six respondents (plaintiffs in the trial court) were owners of restricted property who had signed the agreement or traced their title by mesne conveyances to signers thereof and that they were com-

plaining on behalf of themselves and other plaintiffs similarly situated. It alleged that petitioners (except the insurance company) were owners of restricted property who had signed the agreement or traced their title by mesne conveyances to signers thereof. It alleged that the white Petitioner Burke, after resigning with bad feeling as an officer of the Woodlawn Property Owners Association, threatened to put negroes in every block of the subdivision and that in furtherance of this threat, he conspired with the white dummy Crook to fraudulently conceal from the First National Bank of Englewood, that Crook was purchasing a restricted parcel for the colored Petitioners Hansberry, with mortgage money supplied by the Petitioner Supreme Liberty Life Insurance Company, of which the colored Petitioner Pace is president. It further alleged that the white Petitioner Katz had threatened to sell his restricted property to negroes; that all of the petitioners had constructive notice of the covenant; that Petitioner Burke had actual notice of the covenant by reason of the prior representative suit he brought in his wife's name to enforce it in the Superior Court of Cook County, General No. 567687, wherein the covenant was decreed to have been duly executed upon a stipulation of facts and in full force and effect, which was affirmed on appeal in *Burke* v. *Kleiman,* 277 Ill. App. 519; that Petitioner Katz had actual notice as a signer thereof; that Petitioners Hansberry had actual notice by reason of a prior eviction from property restricted by the same covenant for fraudulently representing to a receiver of the Circuit Court of Cook County that they were white, (*Plath* v. *Delaunty,* General No. 35 C 8078) (R. 277) and that Petitioner Pace had actual notice as a defendant in a prior suit still pending to evict him from property restricted by the covenant, which he likewise

acquired through the fraud of Burke with mortgage money from the insurance company of which he is president. *Cook* v. *Lutz,* Superior Court of Cook County, General No. 37 S 6290 (R. 131). The complaint asked that the fraudulent deed from the white dummy Crook to the colored Petitioners Hansberry be declared void and for injunctive relief and specific performance. (R. 1-14.)

Petitioners' motion to strike the complaint attacked the execution and validity of the covenant under Illinois law and alleged its enforcement would deprive them of their property without due process and deny them equal protection of law under the Federal Constitution. The motions were overruled and a preliminary injunction restraining Burke and Katz from selling or leasing restricted property to negroes, Pace and the Supreme Liberty Life Insurance Company from making loans on restricted property to or for negro occupancy (R. 21) and ordering the Hansberrys to vacate within 90 days or be ousted by a writ of assistance, was sustained on interlocutory appeal. (*Lee* v. *Hansberry,* 291 Ill. App. 517)

After a change of venue, the answers came in attacking again the execution and validity of the covenant under Illinois law and the Federal Constitution. Respondents moved to strike the answers on the ground that the execution and validity of the covenant had been sustained in the three prior class suits; *Burke* v. *Kleiman,* 277 Ill. App. 519; *Cook* v. *Yondorf,* Superior Court of Cook County, General No. 34 S 1261 (R. 294); and *Penoyer* v. *Cohn,* Superior Court of Cook County, General No. 34 S 1681 (R. 301) and formally pleaded *res judicata* as an estoppel by verdict against all of the petitioners and as an estoppel in bar by judgment against Petitioner Katz, who signed the covenant and

Petitioners Burke, Hansberry and Pace, who derived title through signers of the covenant.

The Chancellor proceeded to a trial on the merits without settling the pleadings, reserving his ruling thereon in the following order:

> "This matter coming on to be heard on the plea of counsel for plaintiffs that the case of *Burke* v. *Kleiman* be held *res judicata* as to the issues involved herein, on certain objections filed to the answers, and motions of the several defendants to dissolve the temporary injunctions heretofore issued herein, the court having examined the pleadings herein and heard the arguments of counsel for the respective parties and being fully advised in the premises,
>
> "It is hereby ordered that the matter proceed to a hearing and trial of the merits, and that ruling of the court upon the above plea, objections and motions be reserved until after the cause has been heard on its merits". (R. 54)

Respondents thereupon introduced in evidence the covenant and the pleadings and decree in the prior class suit of *Burke* v. *Kleiman*, 277 Ill. App. 519. In the stipulation therein, neither party admitted the materiality, relevancy, or competency of the facts stipulated, each reserving the right to offer further and other evidence on these and other issues (R. 279). Without limitation, therefore, the court had jurisdiction of every issue which either party could have urged, and so recited in its decree. (R. 236-243.) Respondents then established that all parties plaintiff and defendant (except the insurance company) had signed the agreement or taken their titles subject to the covenant from persons who had signed it, and proved as the trial court found, that Burke, a disgruntled former head of the white property owners association of the district, had

formed a conspiracy with the other petitioners in this court to destroy the effect of the restrictive covenant by introducing negroes into the restricted district; that in pursuance of what the trial court called a "fraudulent scheme", Burke persuaded a white man named Crook to offer to purchase the premises at 6140 Rhodes Avenue, which was subject to the covenant and, by "r..srepresentation, deceit and fraud", prevailed upon the owner of the premises to sell to Crook; that Crook was not a bona fide purchaser but was acting for and on behalf of petitioner Carl Hansberry, a negro; that this purchaser was financed by petitioner life insurance company, of which petitioner Pace was president; that Crook thereupon conveyed the premises to Hansberry and his wife, who took possession; and that these acts "were a part and parcel of the fraudulent scheme and conspiracy inaugurated by James Joseph Burke that said restricted area would be no longer free of negro inhabitants". (R. 80-81.)

At the close of respondent's case in chief, the following objection to the introduction of any evidence by petitioners with respect to the execution or validity of the covenant was noted:

> "In order to expedite matters as far as possible so there won't be a constant run of objections here any more than is necessary, I want to make a general objection such as the other side did in reference to our testimony—that is, if it is agreeable to the Court and counsel to have a general objection and have it carried through without my having to repeat it each time—in this behalf.
>
> "That as to the defendants Israel Katz, Carl A. Hansberry, Nannie L. Hansberry, J. B. Crook, Hallie C. Crook, James Joseph Burke and Harry H. Pace, each of whom is shown by the record to have either signed the Restrictive Agreement in-

troduced in evidence as Plaintiffs' Exhibits 5, 5-A, B and C, or are persons in privity of estate as grantees either direct or remote, of persons who had signed the Agreement, we object to them, or any witnesses for them, or any documentary evidence which seeks to attack the validity of that Agreement as being estopped by reason of being grantees and in privity of estate.

"Then as to all of the defendants we object to any testimony by them or on their behalf which in any way seeks to attack or deny the execution, the delivery, the existence, the compliance with the conditions precedent, the enforceability of the Restrictive Agreement admitted in evidence as Plaintiffs' Exhibits 5 and 5-A, B and C, because of the estoppel, by verdict against each and all of the defendants; from attacking the validity, the delivery, the execution, the existence and enforceability of that agreement, by reason of *res judicata* through the judgment and the decree of the Superior Court of Cook County, Illinois, entered in the case of *Burke* v. *Kleiman et al.*, Gen. No. 567887, entered on October 2, 1933, being a class suit, which decree also was affirmed by the Appellate Court on November 27, 1934, in the Appellate Court for the First District, case No. 37522, entitled there *Burke* v. *Kleiman, et al.*"

* * * * * * *

The Court: "I think that is very satisfactory." (R. 283.)

Subject to this objection, petitioners introduced evidence to the effect that the required number of frontage owners had not signed the agreement; that the acknowledgements were not in order and that the character of the neighborhood had changed. The distorted impression of this evidence created by petitioners' brief, calls for corrections here. On page 11, the evidence that less than the required number of frontage owners

signed the covenant was excluded as incompetent when respondents' objection was sustained. On page 11, it is said the signature of Petitioner Katz was obtained by fraud and trickery, with citations to pages 60-61 and 172 of the record. The first refers to an averment in Katz' amended answer and the second to his abstracted testimony. We ask the court to read the latter and direct its attention to the testimony of respondent's witness Sheedy who took the signature and acknowledgment (R. 189, 319, 323) and to Chancellor Bristow's remark that Katz' testimony "wasn't very satisfactory or convincing" (R. 197). On page 11 and 12 of petitioner's brief, it is stated that the proof shows none of the signatures were acknowledged according to Illinois law. The citation in support of this statement (R. 144-5) is an objection made by petitioner's counsel and the testimony of respondent's witness Sheedy referred to *supra* (R. 189). On page 12, the reference to the testimony of respondent's witness Sommerman is not complete. While it is true she said she did not go through any formality in acknowledging her signature, she added on redirect that she did not know what an acknowledgment was (R. 92-3, 318, 320). In view of the fact that the restrictive agreement was signed and acknowledged more than ten years prior to the date of taking testimony in this case, it is not to be wondered that the recollection of the witnesses should be a little hazy on this point. The Illinois courts properly paid no attention to it.

On page 7, petitioners state as a fact that more than 125 colored families have lived in the restricted area for three to five years before this suit was filed. The citation (R. 58) is to another averment in Katz' amended answer.

With respect to the prior suit of *Burke* v. *Kleiman*, petitioners' brief states at page 16 that Burke's Answer (R. 31-32) charges the invalidity of the agreement was known to the officers of the association at the time the several suits to enforce it were filed and that this charge was never rebutted. A careful reading of Burke's answer reveals no such allegation, as the Supreme Court of Illinois pointed out (R. 330-331). He states under oath that the first time he "believed" the covenant to be invalid was four months before the Hansberry transaction of May 27, 1937 (R. 269). Burke filed the Kleiman complaint in his wife's name four years before acquiring his belief that the covenant was defective (R. 229). He was active in the association at that time and alleges he acted in good faith in that suit. His only reference to officers of the association is that they conducted no investigation of the signed frontage before the attorneys signed the stipulation.

Two of the three living defendants in the prior suit, Isaac Kleiman and Dr. James L. Hall, a colored physician, testified for petitioners that they did not employ counsel or authorize a stipulation of facts in that case (R. 171). In referring to this testimony on page 17 of their brief, petitioners fail to disclose that a fourth defendant, one Charles A. Sopkin was the attorney who represented his co-defendants. (R. 236.) The testimony of the witnesses, Kleiman and Hall, was the only evidence offered by the petitioners on the trial of this case, as to the institution or conduct of the case of *Burke* v. *Kleiman*. Their testimony is the sole evidence in the record upon which petitioner's charges of fraud are founded.

At the close of petitioner's evidence, respondents elected to stand on their plea of *res judicata;* their

general and specific objections that petitioner's computations of frontage and ownership were based on tract books twice removed from the original plats (R. 285), which were not legible (R. 287), and did not show the situation as it existed in 1928 (R. 285), but antedated, in part, the Great Chicago Fire of 1871 (R. 285). The witness had no personal knowledge of their accuracy (R. 285), which was questioned by the Chancellor, who said, "My point is this. There must be something lacking in these tract records to bring about such a tremendous discrepancy" (R. 291), and which included a substantial amount of public school, playground and church frontage not contemplated by the covenant to show the signed frontage was less than the required 95 per cent (R. 287-8). Respondents also relied on the sworn affidavit of Charles A. Churan, counsel for the Woodlawn Property Owner's Association that the owners of more than 95 per cent of the frontage had signed the agreement, according to a chart showing dimensions of lots and blocks kept by the Association in January, 1928 (R. 208). Respondents further relied upon the sworn affidavit of George W. Cook, a director of the association, that he kept a personal check on the property signed by marking it on a chart with colored crayon and knows positively and by careful measurements that more than 95 per cent of the frontage was signed before February 1, 1928, a fact which was verified at a mass meeting of the association and a resolution passed to that effect just before the agreement was recorded. (R. 209.) Respondents further relied on their amended complaint which reduced the total frontage involved (R. 54) and their showing that additional signatures were recorded on December 29, 1928. (R. 208.)

The decree found (1) Petitioners in court with unclean hands and thereby estopped from attacking the

prior adjudication of the execution and validity of the covenant in *Burke* v. *Kleiman,* (2) Respondents to be members of a class having common rights requiring protection, (3) Petitioners (except the insurance company) to be members of the same class as signers or remote grantees of persons who signed the agreement and bound thereby, (4) *Burke* v. *Kleiman* to be a class suit properly pleaded and proved as *res judicata* to the execution and validity of the covenant, (5) the covenant to be in full force and effect and running with the land, (6) Petitioners (including the insurance company) guilty of the conspiracy to violate the covenant and (7) the Hansberrys in unlawful possession of the restricted property and that the deed to them was void and a nullity. It made the temporary injunction permanent and specifically enforced the covenant. It relieved the petitioner Hansberry from suffering forfeitures, however, by ordering a master to reconvey Hansberry's title to his grantor, Crook, (the last white owner), if Hansberry did not himself comply with the covenant by conveying it to someone other than a negro within thirty days. (R. 72.)

Page 17 of Petitioner's brief draws unwarranted deductions from the affidavit of Fred L. Helman, filed in support of a motion for a new trial, which appears at pages 203-6 of the record and speaks for itself. He alleges that he knew from a personal investigation in 1929 that less than the required number of frontage owners signed the covenant but does not, as petitioners imply, state that he ever communicated this information to his fellow officers of the Association in his conferences with them. This is another malicious attempt of petitioners to surround the case of *Burke* v. *Kleiman* with fraud when, in fact, no fraud existed and the affidavit is no foundation for the announcement that the

officers of the association knew the agreement was invalid when that suit was filed.

The motion was denied and an appeal perfected to the Supreme Court of Illinois which affirmed the decree in all respects. The question of fraud was directly raised in that appeal and the court held that if any fraud appeared in the case, it was that of Burke, acting pursuant to his threat to put negroes in every block of the restricted area. (R. 331.)

SUMMARY OF THE ARGUMENT.

The finding of fact by the Supreme Court of Illinois that the only fraud in this record is on the petitioners is supported by the evidence and conclusive. *Kersh Lake Drainage District* v. *Johnson,* 309 U. S. 485. Restrictive agreements by private property owners against ownership or occupation of their land by negroes for twenty-one years are valid and do not offend the Federal Constitution. *Corrigan* v. *Buckley,* 271 U. S. 323. A negro who secured title to restricted property by fraud has no standing in a court of equity to question the bar of *res judicata* of a prior class suit as to the execution and validity of the covenant. Specific performance of the covenant running with the land does not deny him due process. *Cornish* v. *O'Donoghue,* 30 Fed. (2d) 983. Katz signed the agreement and is properly enjoined from carrying out his threat to sell to negroes. The proviso in the covenant protecting mortgages from impairment does not permit the Supreme Liberty Life Insurance Company, as mortgagee, to induce breaches of the private contract and it is properly enjoined from so doing. There being no substantial federal question, the Supreme Court of Illinois should be affirmed or the writ dismissed for want of jurisdiction.

ARGUMENT.

1. The Finding of Fact by the Illinois Supreme Court That the Only Fraud in This Record is on Petitioners is Supported by Competent Evidence and Conclusive Here.

The petition and briefs in support thereof have attempted to distort as fraudulent the facts proved in this record to such an extent that we will consider it first. There appears to be no controversy about the conspiracy in the present case, which is supported by the record, if not admitted by petitioners. However, they have consistently tried to create a suspicion of fraud in the prior case of *Burke* v. *Kleiman,* which has been held *res judicata* here. Eliminating respondent's pleadings, the testimony of their witnesses and pronouncements of the courts, that case is referred to in this record exactly four times. It is found in petitioner's pleadings, of which Burke's answer is typical. As pointed out in our statement of facts, he alleged under oath that he acted in good faith when he sued Kleiman in his wife's name and did not believe the covenant lacked sufficient signatures until four years later. (R. 31.) It next appears in the testimony of Kleiman and Hall, defendants in that suit, who testified for petitioners that they neither employed counsel in that case nor authorized a stipulation. (R. 171-172.) But if their testimony is to be believed, it then appears that they were served with process and thereafter ignored the case entirely, although it was fought vigorously by one of their co-defendants through the Appellate Court of Illinois and culminated in a decree against them for costs and in a writ of assistance to remove Hall from the premises involved in the suit. (R. 236-246.) It appears more probable that they left the defense of the suit entirely to attorney Sopkin, their fellow defendant. To infer otherwise would be

to disregard human nature unless these witnesses were so in the habit of being sued that they thought nothing of it in this instance. It next appears as Plaintiff's Exhibits 28, 29 and 30, which are the opinion and mandate of the Illinois Appellate Court and the stipulation of facts therein. (R. 278.) These exhibits are competent evidence. Its final appearance is in the Helman affidavit in support of the unsuccessful motion for a new trial (R. 203-206) wherein he states he knew from a personal investigation that 95 per cent of the frontage had not signed the covenant but did not state that he communicated his discovery to his fellow officers in the association at the time *Burke* v. *Kleiman* was instituted. Under Illinois law, pleadings and affidavits are not evidence unless offered and received as such. Neither petitioner's pleadings nor Helman's affidavit were placed in evidence. We submit that the competent evidence before the Chancellor with respect to the prior suit of *Burke* v. *Kleiman* consisted of the pleadings, appearances, stipulation, decree and mandate of the Appellate Court in support of its validity and the adverse testimony of Kleiman and Hall, defendants therein, which was entitled to whatever weight the Chancellor gave it. There is nothing whatever in this record to support the contention that plaintiff and defendants in *Burke* v. *Kleiman* were in any way in collusion or that any of them had any thought that the restrictive covenant lacked the necessary signatures after four years of operation and enforcement.

On the appeal below, we assigned as a cross-error that part of the so-called decision of the court wherein the learned Chancellor took it upon himself to *quote* Petitioner Burke to the effect that the prior suit of *Burke* v. *Kleiman* was fraudulent and collusive (R.

193.) The fact is that Burke did not testify in this case at all. We also assigned as a cross-error that part of Finding 20 which holds that "in this cause, he (Burke) represents" the prior suit of *Burke* v. *Kleiman* to have been collusive. (R. 84.) The only representations made by Burke on this record are the self-serving averments contained in his answer, which are not competent evidence as heretofore pointed out.

However, Burke in his answer did *not* allege that *Burke* v. *Kleiman* was a collusive suit but on the contrary stated that it was brought in good faith at a time when he believed the restrictive covenant to be in full force and effect. (R. 31.) In response to our request for a specific ruling on this question of fraud with respect to *Burke* v. *Kleiman,* the Supreme Court of Illinois found as follows:

> "We see no merit in the contention that *Burke* v. *Kleiman, supra,* is not *res judicata* because the fact of due execution was established by stipulation. There is no evidence of fraud or collusion in that case. Defendant Burke, who was beneficial owner of plaintiff's property, avers in his answer here that that suit was instituted at the instance of the Woodlawn Property Owners Association, whose purpose was the enforcement of the restrictive agreement. That may be true, but there is no showing of fraud or collusion in procuring that stipulation or that there was not an actual controversy in the case. At that time Burke was an officer of the Woodlawn Property Owners Association. Afterwards he resigned his position and withdrew from the association with ill feelings, and stated several times that he would put Negroes in every block of that property. In carrying out his threat, he falsely represented that prospective customers were white. As far as the record shows, if any fraud was committed, it was by Burke

after he left the association. It does not appear that he was not acting in good faith in *Burke* v. *Kleiman, supra.* * * * We cannot agree that the court erred in overruling appellants' motion to set aside the decree and for a new trial. This motion was supported by an affidavit of Fred L. Helman, which recited that Helman was executive secretary of the Woodlawn Property Owners Association from 1926 to 1933. The substance of the affidavit is that he had charge of the work of obtaining signatures to the restrictive agreement, and that at the time the case of *Burke* v. *Kleiman, supra,* was instituted, as a result of his own investigation, he knew that the owners of ninety-five per cent of the frontage involved had not signed the agreement, and that he conferred with various officials of the association in regard to the filing of that suit. The affidavit does not state that he communicated his information to anybody, or that Olive Ida Burke or any individual of the representative class for whose benefit the suit was brought, or any of the officers of the association, except Helman, knew of this fact. As far as the affidavit discloses Helman is the only person who knew of the defect. It does not allege the suit was brought at the request of the association or that it was not instituted by Mrs. Burke of her own volition and in good faith, for the benefit of herself and the other members of the class. The motion was properly denied." (R. 330-332)

We submit that this is a finding of fact by the Supreme Court of Illinois, supported by competent evidence and conclusive here. This court, by Mr Justice Black, upheld a state court decision as *res judicata* on unserved creditors in a class action in *Kersh Lake Drainage District* v. *Johnson,* 309 U. S. 485, at page 492 in the following language:

> "It is sufficient to state as to this contention that the issues of fraud and collusion raise no questions which the Supreme Court of Arkansas was not competent finally to decide. And the Supreme Court of Arkansas points out that under controlling Arkansas law the Chancery decrees 'could only have been set aside on appeal or by direct action to annul them on the ground of fraud, and as we have said no appeals were taken, and no fraud on the court in which the decrees were rendered, is reflected by this record.' "

See also *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 116, 117; *Kerfoot* v. *Farmers and Merchants Bank*, 218 U. S. 281, 288; *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243.

2. Restrictive Covenants Such as This Are Valid and do Not Offend the Federal Constitution.

The common law right of private land owners to contract for the control and disposition of their own property by executing and recording a covenant running with the land, by which they bind themselves, their heirs and assigns not to sell, lease or permit negroes to occupy their property for 21 years was settled by the leading case of *Corrigan* v. *Buckley*, 299 Fed. 899, which was dismissed on appeal by this court for want of jurisdiction. *Corrigan* v. *Buckley*, 271 U. S. 323. Except for the publicity value, there is no essential difference between these covenants and one which forbids the premises of the signers to be sold or used for commercial purposes for a limited time. In such instances, as here, property owners place a partial restriction upon the use to which their property may be put for the purpose of protecting the value of each parcel and their own investment. There has been no showing here that negroes are unable to purchase prop-

erty outside this small restricted area. In the absence of such a showing there can be no violation of a Federal right. In the *Corrigan* case, the Court of Appeals for the District of Columbia decided the covenant was not offensive to public policy, the rule against perpetuities or too harsh to be enforced between parties to the agreement. It was contended that the covenant deprived defendant and others of property without due process of law, abridged the privileges and immunities of citizens of the United States, and denied defendants equal protection of law in contravention of the Fifth, Thirteenth and Fourteenth Amendments and certain statutes in aid thereof. In disposing of this argument, Mr. Justice Van Orsdel said at page 901:

> "Appellant seems to have misconceived the real question here involved. We are not dealing with the validity of a statute, or municipal law, or ordinance; nor are we concerned with the right of a negro to acquire, own, and use property; nor are we confronted with any pre-existing rights which are affected by the covenant here in question. The sole issue is the power of a number of landowners to execute and record a covenant running with the land, by which they bind themselves, their heirs and assigns, during a period of 21 years, to prevent any of the land described in the covenant from being sold, leased to, or occupied by negroes.
>
> "The constitutional right of a negro to acquire, own, and occupy property does not carry with it the constitutional power to compel sale and conveyance to him of any particular private property. The individual citizen, whether he be black or white, may refuse to sell or lease his property to any particular individual or class of individuals. The state alone possesses the power to compel a sale or taking of private property, and that only

> for public use. The power of these property owners to exclude one class of citizens implies the power of the other class to exercise the same prerogative over property which they may own. What is denied one class may be denied the other. There is, therefore, no discrimination within the civil rights clauses of the Constitution. Such a covenant is enforceable, not only against a member of the excluded race, but between the parties to the agreement."

In reaching this result, the court followed a line of well reasoned state court decisions: *Parmalee* v. *Morris*, 218 Mich. 625; *Queensborough Land Co.* v. *Cazeaux*, 136 La. 724; *Los Angeles Investment Co.* v. *Gary*, 181 Cal. 680; and *Koehler* v. *Rowland*, 275 Mo. 573. On the appeal of *Corrigan* v. *Buckley* to this court, Mr. Justice Sanford characterized the non-federal questions as "a part of the common or general law in force in the District of Columbia" and said of the alleged constitutional questions, 271 U. S. 323, 330:

> "The Fifth Amendment 'is a limitation only upon the powers of the General Government,' *Talton* v. *Mayes*, 163 U. S. 376, 382, and is not directed against the action of individuals. The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro race. *Hodges* v. *United States*, 203 U. S. 1, 16, 18. And the prohibitions of the Fourteenth Amendment 'have reference to state action exclusively, and not to any action of private individuals.' *Virginia* v. *Rives*, 100 U. S. 313, 318, *United States* v. *Harris*, 106 U. S. 629, 639. 'It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.' *Civil Rights Cases*, 109 U. S. 3, 11. It is obvious that none of these

> Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void."

As in other jurisdictions, the courts of Illinois regard the legality of similar covenants to be settled by this litigation. The Illinois Appellate Court cited it as authority for upholding the agreement at bar in *Burke* v. *Kleiman,* 277 Ill. App. 519, (pleaded as *res judicata* here) at page 533:

> Appellants have not contended that the restrictions violate any of the amendments to the United States Constitution, nor that they are against public policy, but complainant has seen fit to argue, at some length, that the restrictions do not violate the fifth, thirteenth or fourteenth amendments to the United States Constitution and that they are not against public policy. While it is entirely unnecessary, because of appellants' attitude, for us to consider this argument, we may state that the following authorities cited in support of it sustain the position of complainant: *Corrigan* v. *Buckley,* 299 Fed. 899; *Corrigan* v. *Buckley,* 271 U. S. 323; *Parmalee* v. *Morris,* 218 Mich. 625; *Queensborough Land Co.* v. *Cazeaux,* 136 La. 724; *Los Angeles Investment Co.* v. *Gary,* 181 Cal. 680; *Koehler* v. *Rowland,* 275 Mo. 573.

The case was again cited on the interlocutory appeal below by the same court in sustaining this covenant a second time. (*Lee* v. *Hansberry,* 291 Ill. App. 517) and the Supreme Court of Illinois regarded the law on this point as so well settled that it affirmed the covenant without comment. This determination of its local common law by the highest court of the state and of alleged federal questions in harmony with the latest decision

of this court should not be disturbed. See *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, where Mr. Justice Brandeis in delivering the opinion of the court, said at p. 78:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

3. The Illinois Law Enforces the Doctrine of Res Judicata in Representative Suits.

Petitioners contend that one member of a class may not be sued by representatives of the class to enforce a common right. The reasoning that the interests of the person sued are necessarily in conflict with those of the class would prevent all manner of class suits. Such is not the law of Illinois which considers all members of a class having common rights needing protection bound by the doctrine of *res judicata* in a proper representative suit. In *Groves* v. *Farmers State Bank*, 368 Ill. 35, 47, 49, where the former decree was an agreed one, the court said:

> "The Circuit Court of Jefferson County is a court of general and original jurisdiction. Each appellant appearing in the petition to intervene and the motion to vacate was a party to the representative suit instituted by Groves, as a creditor of the State bank, to enforce the stockholders' liability, directly by name or by proper representation

as members of a class. The stockholders, the State Bank and its Receiver, were named defendants. Not only the stockholders but the other creditors of the State bank were also adequately represented. The Circuit Court, it is settled, has jurisdiction to entertain a representative suit in equity in which a remedy is furnished to a class of individual who have common rights and who need protection, and where the remedy is pursued by a complainant who has the right to represent the class to which he belongs, other members of the class are bound by the results in the case until the decree rendered is reversed on appeal (*Leonard* v. *Bye,* 361 Ill. 185). All the creditors were, accordingly, to be deemed parties to the cause. They are now bound by the antecedent proceedings. The final decision of the Court therein binds all persons, whether stockholders or creditors of the State bank * * *. Every material issue and question raised in the intervening petition and motion to vacate was tried and considered on the merits by a court of competent jurisdiction. In particular, by a succession of final decrees, not appealed from, the trial court determined not only that the National bank was a creditor of the State bank but also the amount of its claim. Under the circumstances disclosed by the record, the allegation that the Agreement of October 4, 1930, was *ultra vires* and void. and that the trial court lacked authority to appoint a Receiver for the liquidation of the assets of the State bank are insufficient, even if true, to afford a basis for intervention. The Circuit Court, in refusing to allow appellants to re-litigate closed issues and thereby revive a lawsuit well terminated, cannot be said to have abused its sound judicial discretion."

The case of *Leonard* v. *Bye,* 361 Ill. 185, 190, 192, is to the same effect:

"However, the appellant contends that the equity suit is an absolute nullity so far as he is con-

cerned. He says that the Circuit Court has no jurisdiction over his person, and that he is not bound, 'willy-nilly' by the gratuitous act of complainants who say they represent him there. There can be no doubt that Circuit Courts have jurisdiction over representative suits. In such suits the remedy is furnished to a class of individuals who have common rights, who need protection, and in pursuit of that remedy individuals have the right to represent the class to which they belong. The complainants in the suit purported to represent the appellant, who would be bound by the results in the case until the decree rendered there is reversed on appeal. *Greenberg* v. *City of Chicago,* 256 Ill. 213; *Harmon* v. *Auditor of Public Accounts,* 123 id. 122, 120 * * * The proceedings in the Circuit Court cannot be said to be null and void, for courts of equity have power to entertain representative suits. On appeal it might be successfully urged that the Circuit Court was proceeding erroneously in assuming equity jurisdiction and that its decree should be reversed. The Superior Court did not have before it any of the proceedings in the prior suit and which it had no power to review. It properly refused to go into the question of the Circuit Court's equity jurisdiction over the representative suit. The adoption of the rule contended for by appellant would be disruptive of the orderly process of our courts and fatal to the well-known principle that there must be an end to litigation. We find that the questions argued by appellant cannot be reached and passed upon."

In *Schmidt* v. *Modern Woodmen,* 261 Ill. App. 276, 281, the court said:

"The *Jenkins* suit was brought in behalf of the complainants and in behalf of all other members of the Society. It was a class suit. Where a *bona fide* Bill is filed and litigated by the representatives of a class and the subject-matter of the suit is com-

mon to all, the decree binds the entire class as fully as if all were before the Court. *People* v. *Clary*, 296 Ill. 46".

In *Greenberg* v. *Chicago*, 256 Ill. 213, 219, the bar was extended to all issues which might have been raised in the prior suit whether they were or not.

> "* * * the rule applies with particular force that the doctrine of former adjudications is not confined to the questions actually decided, but it extends to all grounds of recovery or defense which existed and might have been presented. * * * The complainants in this proceeding were represented by the complainants in the former suit and are therefore bound by the decree therein entered. The remedy in suits of the character here indicated is in the interest of a class of individuals having common rights that need protection, and in the pursuit of that remedy individuals have the right to represent the class to which they belong."

And in *People ex rel. Modern Woodmen* v. *Circuit Court*, 347 Ill. 34, 46, it was held:

> "The rule concerning *res judicata* embraces not only what was actually determined in the former case between the same parties or their privies, but it extends to any other matter properly involved which might have been raised and determined and to all grounds of recovery or defense which might have been presented (*Phelps* v. *City of Chicago*, 331 Ill. 80; *People* v. *Harrison*, 253 id. 625; *Godschalck* v. *Weber*, 247 id. 269."

A document once held valid by a court of competent jurisdiction cannot be attacked by the parties or their privies in a subsequent suit. In *Hanna* v. *Read*, 102 Ill. 596, 602, 606, it was held:

> "* * * where some specific fact or question has been adjudicated and determined in a former

suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. This species of estoppel is known to the law as an estoppel by verdict, and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by a defendant as matter of defense. * * * It is further objected that the parties to the former and present suits are not the same. This objection we do not regard as tenable. It is sufficient for the purpose of the rule relating to a former adjudication, when relied on as an estoppel that the parties be substantially the same, and so we regard them in the present case. *Thompson* v. *Roberts,* 24 How. 233; 7 Rob. Prac. 1^7; *Drake* v. *Perry,* 58 Ill. 122."

Harding Co. v. *Harding,* 352 Ill. 417, 426, sets forth the Illinois law on *res judicata.*

"The doctrine of *res judicata* is, that a cause of action finally determined between the parties on the merits, by a court of competent jurisdiction, cannot again be litigated by new proceedings before the same or any other tribunal, except as the judgment or decree may be brought before a court of appellate jurisdiction for review in the manner provided by law. A judgment or decree so rendered is a complete bar to any subsequent action on the same claim or cause of action between the same parties or those in privity with them. The doctrine extends not only to the questions actually decided but to all grounds of recovery or defense which might have been presented. (*Wright* v. *Briffey,* 147 Ill. 496; *Markley* v. *People,* 171 id. 260; *Terre Haute and Indianapolis Railroad Co.* v. *Peoria and Pekin Railway Co.,* 186 id. 283; *God-*

schalck v. *Weber*, 247 id. 269; *People* v. *Harrison*, 253 id. 526. * * * Whether the adjudication relied on as an estoppel goes to a single question or all the questions involved in the case, the fundamental principle upon which it is allowed is that justice and public policy alike demand that a matter, whether consisting of one or many questions, which has been solemnly adjudicated in a court of competent jurisdiction, shall be deemed finally and conclusively settled in any subsequent litigation between the same parties where the same question or questions arise, except where the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication." * * * *

In *Bayer* v. *Block*, 246 Ill. App. 416, 421, 423, 424, the doctrine was applied to a consent decree based on a stipulation:

"In the stipulation, filed in said chancery cause, it was agreed between all the parties that they 'hereby waive further proceedings * * * and that an order of court may be entered, reciting the facts and the making of this agreement, etc. * * *.' In *Godschalck* v. *Weber*, 247 Ill. 269, 274, it is said: 'The doctrine of *res judicata* extends not only to the questions which were actually decided in the former case, but to the whole controversy, to all matters properly involved which might have been raised and determined, and to all grounds of recovery or defense which the parties might have presented, whether they did so or not.' (See also *Stickney* v. *Goudy*, 132 Ill. 213, 231; *South Park Com'rs.* v. *Ward & Co.*, 246 Ill. 299, 312) * * *. In view of these authorities, and applying them to the facts as disclosed in the present transcript and as above outlined, we are of the opinion that the contentions of defendant's counsel are well founded; that the consent decree, entered in said equity suit upon motion of complainants' solicitor

and upon stipulation, is *res judicata* of the controversy in the present suit at law, and is, under the doctrine of estoppel by verdict, a bar to any recovery by plaintiffs herein, it appearing that the parties to the two suits are substantially the same; and that the trial court erred, as a matter of law, in entering the judgment appealed from, and that it should be reversed without remanding the cause."

The bar covers newly discovered evidence, *People* v. *Prather,* 343 Ill. 443; 447.

"We shall not consider at length the insufficient proof presented in support of these amendments, none of which was verified by the testimony of the drainage commissioners or clerk holding office seven (7) years earlier, (1920), when the acts are alleged to have taken place, because even newly discovered evidence does not prevent the application of *res judicata.* Many, perhaps a majority, of the cases in which the doctrine of *res judicata* is enforced are cases in which facts have been discovered after the adjudication, which, if they had been known at the former trial, might have changed the result. A judgment or decree which necessarily affirms the existence of any fact is conclusive upon the parties and their privies whenever the existence of that fact is again in issue between them. (*Gould* v. *Sternberg,* 128 Ill. 510)"

Res Judicata binds the former parties and their privies in title and interest, *Klus* v. *Ruszel,* 353 Ill. 179, 183.

"The answer of the plaintiffs in error alleges the filing of the Bill by Bialek on January 23, 1925, in the Circuit Court, and the filing of the Cross Bill by Klus, and relies, among other things, upon the decree of dismissal in that case as a final and conclusive adjudication of the rights of the parties. The parties in this case are the same as the parties in the former case or are privies in title and

> interest with them, the subject matter, cause of action and issue are the same and the quality in which the parties sue or defend is the same. The decision of the former case was upon the merits, and the fact that it was rendered on a demurrer is immaterial. (*Foss* v. *People's Gas Light Co.*, 293 Ill. 94.) It is binding on the defendants in error and conclusive of their rights."

On the record below, the Supreme Court of Illinois found the prior class suit of *Burke* v. *Kleiman* was *res judicata* on the due execution of the covenant in this case and binding on the petitioners as signers thereof or privies in estate thereto by reason of taking their titles subject to and with notice of the restrictions running with the land. We quote from the opinion herein:

> "In order to decide whether the question of due execution is *res judicata,* it will be necessary to examine the case of *Burke* v. *Kleiman, supra.* That was a suit to enforce this same agreement. Olive Ida Burke, wife of James J. Burke, a defendant in the case at bar, was plaintiff. The complaint recited that she filed it 'on behalf of herself and on behalf of all other property owners in the district covered and affected by the agreement hereinafter mentioned, and who are, or whose grantors, direct or otherwise, were parties to said indenture of agreement, and whose property interests will be adversely and injuriously affected by the violation hereinafter mentioned by the said defendants of the covenants and terms of said agreement.' The defendants were Isaac Kleiman, the white owner, Sam Kleiman, James L. Hall, a Negro tenant, and Charles J. Sopkin, trustee of a trust deed on the property. The complaint alleged the agreement was signed by the owners of ninety-five percent of the frontage and duly recorded February 1, 1928. A stipulation was entered into to this effect. The court recited the

stipulation in its decree and found that the facts stipulated were true. The court further found, 'that said indenture was in full force, and effect on February 1, 1928, and all conditions therein contained with respect to execution and recordation thereof were fully complied with;' that 'all terms of said indenture agreement are entirely valid and binding,' and that it is a covenant running with the land. This decree was affirmed by the Appellate Court.

"It thus appears that *Burke* v. *Kleiman, supra,* was a class or representative suit. It cannot be seriously contended that it was not properly a representative suit. There was a class of individuals who had common rights and who needed protection. They were so numerous it would have imposed an unreasonable hardship and burden on them to require all members to be made parties to the suit. Under such circumstances we have repeatedly held that a court of equity has jurisdiction of representative suits, and where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs, other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings. *Groves* v. *Farmers State Bank,* 368 Ill. 35; *Leonard* v. *Bye,* 361 id. 185; *Greenberg* v. *City of Chicago,* 256 id. 213." (R. 329-330)

Respondents assigned as a cross-error in the appeal below that part of Finding 7 wherein Chancellor Bristow found "from the *competent* proof adduced" that the owners of less than 95 per cent of the frontage had signed the agreement. All of petitioner's evidence with respect to execution was received subject to respondent's objection. It is our view that when the Chancellor sustained the plea of *res judicata,* all of that proof was excluded as incompetent and not properly

before him. On this point the Supreme Court of Illinois said in its opinion (R. 330, 331):

> "Appellants contend the doctrine is inapplicable here for the reason there was no class, since the evidence shows the requirement that the owners of ninety-five per cent of the frontage sign the agreement, was not met. This argument loses sight of the fact that in *Burke* v. *Kleiman, supra,* the court had jurisdiction to determine whether or not that condition precedent had been complied with. The mere fact that it later appears that the finding is untrue does not render the decree any the less binding. The principle of *res judicata* covers wrong as well as right decisions, for the fundamental reason that there must be an *end of litigation. A matter* which has once been determined by a court of competent jurisdiction cannot, in a later suit involving the same subject matter and the same parties or members of the same class, be again inquired into * * *. We see no merit in the contention that *Burke* v. *Kleiman, supra,* is not *res judicata* because the fact of due execution was established by stipulation. There is no evidence of fraud or collusion in that case. * * * In our opinion the questions of execution and validity of the restrictive agreement are *res judicata.* The reasons assigned, in addition to these urged in *Burke* v. *Kleiman, supra,* for holding the agreement invalid cannot be considered. It is well settled that the doctrine of *res judicata* extends not only to matters actually determined in the former suit, but also embraces all grounds of recovery and defense involved and which might have been raised. By assigning new reasons for holding the agreement invalid, which existed at the time that decision was rendered, the parties cannot relitigate the question settled by the prior decree. *In re Northwestern University,* 206 Ill. 64; *Midlinsky* v. *Rubin,* 341 id. 378; *People* v. *Wade,* 351 id. 484; *Webb* v. *Gilbert,* 357 id. 340."

(See also: Phelps v. City of Chicago, 331 id. 80, p. 85.)

This court recognizes that *res judicata* is a question of state law. *Kersh Lake Drainage Co.* v. *Thompson,* 309 U. S. 485, 491. *Oklahoma Packing Co.* v. *Gas Co.,* 309 U. S. 4, 8; *Union and Planters Bank* v. *Memphis,* 189 U. S. 71, 75; *Covington* v. *1st National Bank of Covington,* 198 U. S. 100, 109; and *Wright* v. *Georgia Railroad and Banking Co.,* 216 U. S. 420, 429.

It follows that the decision below was rested upon a point of state law adequate to support it. We have shown that there was no fraud involved (except such as can be imputed to these petitioners) and, in the absence of fraud, no federal question for review by this Court is presented.

The opinion of the Supreme Court of Illinois does not mention petitioner's contention that the application of the doctrine in this case denies their rights to due process of law as citizens of the United States. The contention was forcibly urged below and it cannot be assumed to have been ignored. On the contrary, in balancing the equities, the court must have considered that petitioner's own misconduct estopped them from attacking respondent's plea of *res judicata* and that the decree binding them as members of a class whose rights were represented in the prior suit does not offend the Fourteenth Amendment. This is the question to which we shall next address ourselves.

4. The State Court Decree Does Not Offend the Fourteenth Amendment.

Section 1 of the Fourteenth Amendment has been bandied about in such loose language by the Petitioners that a detailed examination of it is in order. It contains three inhibitions on the States. The first bars

the making or enforcing of any law which shall abridge the privileges or immunities of citizens of the United States. The second prevents the deprivation of any person's life, liberty or property without due process of law. The third prohibits the denial to any person within its borders of the equal protection of the laws.

We are not concerned here with the first or third inhibitions. They were disposed of in *Corrigan* v. *Buckley,* 299 Fed. 899, wherein the court pointed out with respect to the first that the constitutional privilege of a negro to own property does not carry with it the constitutional right to compel sale and conveyance to him of any particular private property. The court disposed of the third inhibition by stating that the power of the white owners to exclude negroes from their property implies the power of negro owners to exclude whites from their property so that the law protects both classes equally.

We are concerned with the second prohibition after eliminating the protection to life and liberty. As applied to this case, it reads:

> *"Nor shall any State deprive any person of * * * property without due process of law."*

The first inquiry, therefore, is what property of these petitioners is involved. The record reveals that the only property of which the state court could deprive any of these petitioners is Hansberrys apartment and restricted lot, which he acquired through the fraud of his conspirators. The invocation of this constitutional provision by all the other petitioners is therefore without merit. The decree complained of requires the white conspirator Burke to observe a restriction which was on his property before he acquired title and of which he had actual knowledge. It re-

quires the white Petitioner Katz to abide by his own agreement with other property owners. It requires the petitioner insurance company through the colored Petitioner Pace, its president, to stop inducing breaches of a private contract. With due regard for the liberal construction which this constitutional safeguard should be accorded, as far as these petitioners are concerned, there is no property on this record for the due process clause of the Fourteenth Amendment to protect.

In *Enterprise Irrig. Dist.* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 166, Mr. Justice Van Devanter said:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. *Sayward* v. *Denny*, 158 U. S. 180, 186; *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Castillo* v. *McConnico*, 168 U. S. 674, 683-684.

Petitioners argue that their paramount and dominant "right to live and a place to live in" as free citizens of the United States have in some way been abridged by the Illinois Courts, citing *Colgate* v. *Harvey*, 296 U. S. 404, 427. In this, they fall into the same error as the appellants in the *Gorrigan* case. Petitioners are at liberty to acquire and exercise all of the rights of ownership of real estate, including the right to exclude white people by private agreement among themselves, except the small area in Chicago which is subject to the restriction at bar. The decision of the Illinois courts does not affect these rights in any way. It is argued that *Colgate* v. *Harvey* extended the scope of the Fourteenth Amendment by recognizing federal rights stemming from United States citizenship as

paramount and dominant to rights derived from state citizenship. While we do not understand any such federal rights to be involved here we must point out that *Colgate* v. *Harvey* has been expressly overruled in *Madden* v. *Kentucky,* 309 U. S. 83, 93.

5. Specific Performance Does Not Offend the Fourteenth Amendment.

The decree did not require Hansberry to convey his fraudulently acquired title without compensation. It afforded him thirty days to comply with the covenant by conveying to any person other than a negro for any consideration of his choice. The deed to him had been declared void and a nullity by the trial court and the Supreme Court of the State of Illinois. Here, by the provisions in the decree the court gave Hansberry the opportunity to save himself from the penalties of forfeiture, despite the fraud he had perpetrated and further protected him in the event he refrained from acting voluntarily, by placing the title back in his grantor and dummy, the last white owner to hold it, thus removing the continuing violation of the covenant and remaking the title merchantable. It but performed as to the title what the writ of assistance did as to the possession in the enforcement of the injunction. It stopped the continuing violation of the covenant, as a proper incident in enforcing the decree, under the prayer for general relief. No compensation was due to the tort feasor Hansberry in accomplishing this relief. No property of his was taken from him. His deed was void and a nullity. He was entitled to no recompense as a price to be paid by these respondents to relieve them of the fraud he had inflicted upon them. See *Svalina* v. *Saravans,* 341 Ill. 236, at p. 249:

> "It is insisted by appellants that the master and the decree found that the deed to Svalina should

> be set aside as a cloud upon the title of Anna Yelich but erroneously failed to return to Svalina the $500 loaned by him to Yelich. * * * In *Beidler* v. *Crane,* 135 Ill. 92, it was held that a transfer of property must not only be upon a good consideration but it must also be bona fide; that even though the grantee pays a valuable, adequate and full consideration, yet if the grantor sells for the purposes of defeating the claims of creditors and the grantee knowingly assists in such fraudulent intent, or even has notice thereof, he will be regarded as a participant in the fraud, and that a deed fraudulent in fact may be set aside by creditors, and it will not be permitted to stand for the purpose of reimbursement or indemnity. Several authorities were cited in that case supporting this holding. These authorities were sufficient to uphold the decree denying to Svalina any right of reimbursement from Anna Yelich for the $500."

We submit that bringing the property within the terms of the covenant was the only way its merchantable status could be restored so that the master's deed would benefit Hansberry instead of deprive him of his property within the meaning of the Fourteenth Amendment.

The Court of Appeals for the District of Columbia was faced with the suggested conflict between specific performance of such a covenant and the Fourteenth Amendment in *Cornish* v. *O'Donoghue,* 30 Fed. (2d) 983, wherein the deed to the negro was recorded before suit was filed. The court rejected the Constitutional objection and sustained a decree, declaring the deed void and enjoining the defendants "forthwith peremptorily to remove themselves and all their personal property and that of each of them from the said premises" without mention of compensation. Similar

decrees were sustained in *Torrey* v. *Wolfes,* 6 Fed. (2d) 702 and *Russell* v. *Wallace,* 30 Fed. (2d) 981.

This court said in *Fox River Co.* v. *R. R. Comm.,* 274 U. S. 651, 657:

> "It is for the state court in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determined to be non-existent."

6. The Record Supports the Injunction Against Katz.

The decree obliges Petitioner Katz to abide by his own agreement with the other property owners who signed the covenant. His signature and acknowledgment are at pages 319 and 323 of the record. In 1937, Katz was a witness in an administrative proceeding before the State Department of Education and Registration at Chicago. He was asked, "Would you sell your property at 6018 Vernon Avenue, Chicago, Illinois, to the colored people, notwithstanding the agreement that is recorded in the particular district, Washington Park District, in which your property is located and in which you, the owner, then owner of your property was a signer, or yourself?" He replied under oath, "Yes, I would. I would sell it to anybody that I could get a buyer to purchase it. I would sell it now if I could." (R. 122.) This evidence adequately supports the injunction against Katz and deprives him of nothing which is protected by the Fourteenth Amendment.

The Insurance Company is Not Exempt as a Mortgagee.

Paragraph 3 of the covenant contains the following proviso:

> "and provided, further, that the lien of no mortgage or trust deed in the nature of a mortgage shall be impaired or invalidated by reason of the breach of any of the provisions of this agreement, whether any such breach shall have occurred prior or subsequent to the recording of any such mortgage or trust deed; and provided, further, that nothing contained in the foregoing provisos shall in any manner impair the right of any person or persons interested to enforce at all times and against all persons the restrictions in this agreement contained prohibiting the use or occupation of all or any part of said premises by a negro or negroes" (R. 316).

Petitioners contend that this exempts mortgagees from the operation of the covenant and that the decree enjoining the Supreme Liberty Life Insurance Company from making future loans on restricted property to or for negroes was erroneous. As we read the proviso, its purpose is to protect mortgages on restricted property from impairment in proceedings such as this to enforce the covenant. The decree complained of does not impair this petitioner's mortgage on the Hansberry property. It protects the mortgage by restoring the property to a legal and merchantable status within the covenant. The proviso does not permit mortgagees to conspire in the future to induce breaches of the private agreement between the property owners and thus destroy the covenant. The evidence shows that is what this company was doing and the injunction simply requires it to stop its unlawful activity under the prayer for general relief. It raises no federal question and should not be disturbed.

CONCLUSION.

We have shown the private agreement between the property owners to be valid under Illinois law and not offensive to the Federal Constitution. All the petitioners, except the insurance company, which however was one of the conspirators, either signed it or are privies thereto by reason of having derived their titles from persons who signed it. All the petitioners had actual as well as constructive notice of the burdens appurtenant to the restricted property. Their conspiracy to destroy it is of record. On the day of reckoning, they complain of the loss of certain defenses which they might have urged if the court had not bound them, as a matter of local law, by a prior decision that the covenant is valid. Their rights in the prior case were represented by a member of the class to which they belong. They attack the prior case as fraudulent but the record is barren of fraud—except their own. They charge there is no restrictive agreement because of defects in its execution and place great reliance on the comments of the Chancellor in this regard. As to this, it should be noted that the Chancellor with manifest fairness to the petitioners, heard every defense they advanced, subject to our objection. When the record was complete, he sustained our objection, held the prior suit *res judicata* and found petitioners estopped by their own misconduct to question the bar of the prior suit. They have had their day in court and a full and fair hearing. They have argued with great feeling that there is something unfair in obliging them to observe an agreement which they claim does not exist. We think one of the answers to this is that after nine years of effective operation, they voluntarily resorted to a fraudulent conspiracy to get around it.

We respectfully request that the Supreme Court of Illinois be affirmed or that the writ of certiorari be dismissed for want of jurisdiction.

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P. 4.

SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1940.

Carl A. Hansberry, Nannie L. Hansberry, et al., Petitioners,
vs.
Anna M. Lee, Edward L. Govanus, Esther Govanus, et al.

On Writ of Certiorari to the Supreme Court of the State of Illinois.

[November 12, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

The question is whether the Supreme Court of Illinois, by its adjudication that petitioners in this case are bound by a judgment rendered in an earlier litigation to which they were not parties, has deprived them of the due process of law guaranteed by the Fourteenth Amendment.

Respondents brought this suit in the Circuit Court of Cook County, Illinois, to enjoin the breach by petitioners of an agreement restricting the use of land within a described area of the City of Chicago, which was alleged to have been entered into by some five hundred of the land owners. The agreement stipulated that for a specified period no part of the land should be "sold, leased to or permitted to be occupied by any person of the colored race", and provided that it should not be effective unless signed by the "owners of 95 per centum of the frontage" within the described area. The bill of complaint set up that the owners of 95 per cent of the frontage had signed; that respondents are owners of land within the restricted area who have either signed the agreement or acquired their land from others who did sign and that petitioners Hansberry, who are Negroes, have, with the alleged aid of the other petitioners and with knowledge of the agreement, acquired and are occupying land in the restricted area formerly belonging to an owner who had signed the agreement.

To the defense that the agreement had never become effective because 95 per cent of the frontage owners had not signed it, respondents pleaded that that issue was *res judicata* by the decree in

an earlier suit. *Burke* v. *Kleiman,* 277 Ill. App. 519. To this petitioners pleaded, by way of rejoinder, that they were not parties to that suit or bound by its decree, and that denial of their right to litigate, in the present suit, the issue of performance of the condition precedent to the validity of the agreement would be a denial of due process of law guaranteed by the Fourteenth Amendment. It does not appear, nor is it contended that any of petitioners is the successor in interest to or in privity with any of the parties in the earlier suit.

The circuit court, after a trial on the merits, found that only about 54 per cent of the frontage owners had signed the agreement, and that the only support of the judgment in the *Burke* case was a false and fraudulent stipulation of the parties that 95 per cent had signed. But it ruled that the issue of performance of the condition precedent to the validity of the agreement was *res judicata* as alleged and entered a decree for respondents. The Supreme Court of Illinois affirmed. 372 Ill. 369. We granted certiorari to resolve the constitutional question. 309 U. S. 652.

The Supreme Court of Illinois, upon an examination of the record in *Burke* v. *Kleiman, supra,* found that that suit, in the Superior Court of Cook County, was brought by a landowner in the restricted area to enforce the agreement which had been signed by her predecessor in title, in behalf of herself and other property owners in like situation, against four named individuals who had acquired or asserted an interest in a plot of land formerly owned by another signer of the agreement; that upon stipulation of the parties in that suit that the agreement had been signed by 95 per cent of all the frontage owners, the court had adjudged that the agreement was in force, that it was a covenant running with the land and binding all the land within the described area in the hands of the parties to the agreement and those claiming under them including defendants, and had entered its decree restraining the breach of the agreement by the defendants and those claiming under them, and that the appellate court had affirmed the decree. It found that the stipulation was untrue but held, contrary to the trial court, that it was not fraudulent or collusive. It also appears from the record in *Burke* v. *Kleiman* that the case was tried on an agreed statement of facts which raised only a single issue, whether by reason of changes in the restricted area, the agreement had ceased to be enforcible in equity.

From this the Supreme Court of Illinois concluded in the present case that *Burke* v. *Kleiman* was a "class" or "representative" suit and that in such a suit "where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings"; that petitioners in the present suit were members of the class represented by the plaintiffs in the earlier suit and consequently were bound by its decree which had rendered the issue of performance of the condition precedent to the restrictive agreement *res judicata*, so far as petitioners are concerned. The court thought that the circumstance that the stipulation in the earlier suit that 95 per cent of the frontage owners had signed the agreement was contrary to the fact as found in the present suit did not militate against this conclusion since the court in the earlier suit had jurisdiction to determine the fact as between the parties before it and that its determination, because of the representative character of the suit, even though erroneous, was binding on petitioners until set aside by a direct attack on the first judgment.

State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 273.

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer* v. *Neff*, 95 U. S. 714; 1 Freeman on Judgments (5th ed.), § 407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R. S. § 905, 28 U. S. C. § 687, prescribe, *Pennoyer* v. *Neff*, *supra*; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Hall* v. *Lanning*,

91 U. S. 160; *Baker* v. *Baker, E. & Co.*, 242 U. S. 394, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires. *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464; *Old Wayne Mut. L. Ass'n* v. *McDonough*, 204 U. S. 8.

To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. *Smith* v. *Swormstedt*, 16 How. 288; *Royal Arcanum* v. *Green*, 237 U. S. 531; *Hartford L. Ins. Co.* v. *Ibs*, 237 U. S. 662; *Hartford Life Ins. Co.* v. *Barber*, 245 U. S. 146; *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356; cf. *Christopher* v. *Brusselback*, 302 U. S. 500.

The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the former fairly represent the latter in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. *Brown* v. *Vermuden*, Ch. Cas. 272; *City of London* v. *Richmond*, 2 Vern. 421; *Cockburn* v. *Thompson*, 16 Ves. Jr. 321; *West* v. *Randall*, 2 Mas. 181; *Beatty* v. *Kurtz*, 2 Pet. 566; *Smith* v. *Swormstedt, supra; Supreme Tribe of Ben Hur* v. *Cauble, supra;* Story, Equity Pleading (2d ed.) § 98.

It is evident that the considerations which may induce a court thus to proceed, despite a technical defect of parties, may differ from those which must be taken into account in determining whether the absent parties are bound by the decree or, if it is adjudged that they are, in ascertaining whether such an adjudication satisfies the requirements of due process and of full faith and credit. Nevertheless there is scope within the framework of the

Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit. Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits; cf. *Brown* v. *New Jersey*, 175 U. S. 172; *Brown* v. *Mississippi*, 297 U. S. 278; *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123; *Avery* v. *Alabama*, 308 U. S. 444, 446, 447, nor does it compel the adoption of the particular rules thought by this court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests, cf. *Jackson County* v. *United States*, 308 U. S. 343, 351, this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 235.

It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, *Plumb* v. *Goodnow*, 123 U. S. 560; *Confectioners' Machinery Co.* v. *Racine Engine & Mach. Co.*, 163 Fed. 914; 170 Fed. 1021; *Bryant El. Co.* v. *Marshall*, 169 Fed. 426, or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. *Smith* v. *Swormstedt*, *supra*; cf. *Christopher* v. *Brusselback*, *supra*, 503, 504, and cases cited.

In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit. See *Bernheimer* v. *Converse*, 206 U. S. 516; *Marin* v. *Angedahl*, 247 U. S. 142; *Chandler* v. *Peketz*, 297 U. S. 609. Nor do we find it necessary for the decision of this case to say that, when the only

circumstance defining the class is that the determination o
rights of its members turns upon a single issue of fact or law, a
could not constitutionally adopt a procedure whereby some
members of the class could stand in judgment for all, provide
the procedure were so devised and applied as to insure that
present are of the same class as those absent and that the litig
is so conducted as to insure the full and fair consideration
common issue. Compare *New England Divisions Case,* 261
184, 197; *Taffart* v. *Bremner,* 236 Fed. 544. We decide only
the procedure and the course of litigation sustained here by the
of *res judicata* do not satisfy these requirements.

The restrictive agreement did not purport to create a joint
gation or liability. If valid and effective its promises wer
several obligations of the signers and those claiming under
The promises ran severally to every other signer. It is plain
in such circumstances all those alleged to be bound by the a
ment would not constitute a single class in any litigation br
to enforce it. Those who sought to secure its benefits by enfo
it could not be said to be in the same class with or represent
whose interest was in resisting performance, for the agreeme
its terms imposes obligations and confers rights on the own
each plot of land who signs it. If those who thus seek to s
the benefits of the agreement were rightly regarded by the
Supreme Court as constituting a class, it is evident that
signers or their successors who are interested in challengin
validity of the agreement and resisting its performance are n
the same class in the sense that their interests are identical so
any group who had elected to enforce rights conferred by the a
ment could be said to be acting in the interest of any others
were free to deny its obligation.

Because of the dual and potentially conflicting interests of
who are putative parties to the agreement in compelling or resi
its performance, it is impossible to say, solely because they
parties to it, that any two of them are of the same class. Nor
out more, and with the due regard for the protection of the n
of absent parties which due process exacts, can some be perm
to stand in judgment for all.

It is one thing to say that some members of a class may repr
other members in a litigation where the sole and common int

of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. *Smith* v. *Swormstedt, supra; Supreme Tribe of Ben Hur* v. *Cauble, supra; Groves* v. *Farmers State Bank,* 368 Ill. 35. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far. See *Terry* v. *Bank of Cape Fear,* 20 Fed. 777, 781; *Weidenfeld* v. *N. Pac. Ry. Co.,* 129 Fed. 305, 310; *McQuillen* v. *National Cash Register Co.,* 22 F. Supp. 867, 873, aff'd 112 F. (2d) 877, 882; *Brenner* v. *Title Guarantee & Trust Co.,* 276 N. Y. 230; cf. *Wabash R. R. Co.* v. *Adelbert College,* 208 U. S. 38; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413. Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants. *Tumey* v. *Ohio,* 273 U. S. 510.

The plaintiffs in the *Burke* case sought to compel performance of the agreement in behalf of themselves and all others similarly situated. They did not designate the defendants in the suit as a class or seek any injunction or other relief against others than the named defendants, and the decree which was entered did not purport to bind others. In seeking to enforce the agreement the plaintiffs in that suit were not representing the petitioners here whose substantial interest is in resisting performance. The defendants in the first suit were not treated by the pleadings or decree as representing others or as foreclosing by their defense the rights of others, and even though nominal defendants, it does not appear that their interest in defeating the contract outweighed their interest in establishing its validity. For a court in this situation to ascribe to either

the plaintiffs or defendants the performance of such functions on behalf of petitioners here, is to attribute to them a power that it cannot be said that they had assumed to exercise, and a responsibility which, in view of their dual interests it does not appear that they could rightly discharge.

Reversed.

Mr. Justice McReynolds, Mr. Justice Roberts and Mr. Justice Reed concur in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.